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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

314-700

No. 797

STATE OF MISSOURI AND ROY McKITTRICK, AS ATTORNEY GENERAL OF MISSOURI, *Petitioners*,

vs.

ST. LOUIS UNION TRUST COMPANY, TRUSTEE UNDER INDENTURE OF TRUST MADE FEBRUARY 14, 1921, BY MADGE BARNEY BLAKE,

ST. LOUIS UNION TRUST COMPANY, TRUSTEE UNDER INDENTURE OF TRUST MADE JANUARY 11, 1929, BY MADGE BARNEY BLAKE,

ST. LOUIS UNION TRUST COMPANY, CHARLES B. MALOY AND CLARENCE E. MALOY, TRUSTEES UNDER INDENTURE OF TRUST MADE MAY 20, 1935, BY MADGE BARNEY BLAKE.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

ROY McKITTRICK,
Attorney General of Missouri,

WILLIAM C. CONNETT, IV,
Assistant Attorney General of Missouri,

RUSSELL C. STONE,
Assistant Attorney General of Missouri,

Counsel for Petitioners.

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NO.....

STATE OF MISSOURI AND ROY McKITTRICK, AS ATTORNEY GENERAL OF MISSOURI, *Petitioners*,

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ST. LOUIS UNION TRUST COMPANY, CHARLES B. MALOY AND CLARENCE E. MALOY, TRUSTEES UNDER INDENTURE OF TRUST MADE MAY 20, 1935, BY MADGE BARNEY BLAKE.

PETITION FOR WRIT OF CERTIORARI.

May it Please the Court:

The petition of State of Missouri and Roy McKittrick, as Attorney General of the State of Missouri, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

This petition is filed to obtain a review of a final judgment of the Supreme Court of the State of Missouri dated October 30, 1941, opinion filed July 21, 1941 (R. 115), in the case of St. Louis Union Trust Company et al. v. State of Missouri (not as yet officially reported), 155 S. W. (2d) 107, Motion for Rehearing overruled October 30, 1941 (R. 139), holding that the State of Missouri did not have a lien on the assets of the trust estates created by the late Madge Barney Blake, a resident of the Commonwealth of Massachusetts, for inheritance taxes in the sum of $182,349.69 (R. c). The judgment of the Supreme Court of Missouri reversed the judgment of the Circuit Court of the City of St. Louis, Missouri, dated December 12, 1940 (R. b, 126).

On November 8, 1939, the St. Louis Union Trust Company, Charles B. Maloy and Clarence E. Maloy filed a petition in the Circuit Court of the City of St. Louis, Missouri, for the purpose of denying the claim of lien of the State of Missouri on the assets of the trust estates created by Madge Barney Blake (R. 2, 12). In substance, it was alleged that Madge Barney Blake was domiciled in the State of Massachusetts, and died on July 12, 1935 (R. 7). While domiciled in Massachusetts, the decedent created and established three trusts dated February 14, 1921, January 11, 1929, May 20, 1935, within the State of Missouri with the St. Louis Union Trust Company and Clarence E. and Charles B. Maloy, consisting of securities having a value at the date of death of $1,850,789.77 (R. 7). The trusts dated February 14, 1921, and May 20, 1935, were revocable (R. 4, 5), while the one dated January 11, 1929, was irrevocable (R. 6). By the terms of the trust instruments, the settlor reserved the income from the assets of the trusts during her lifetime, and at her death, after setting apart certain funds for the benefit of named bene-

ficiaries, provided that the residue should be distributed amongst named charitable institutions (R. 3, 5, 6).

At the time of the death of Madge Barney Blake there was in effect in the State of Missouri an inheritance tax law contained in the Revised Statutes of Missouri, 1929, Chapter 1, Article 21, Sections 570 to 604, inclusive, as amended by Laws of Missouri, 1931, page 130, now contained in the Revised Statutes of Missouri, 1939, Chapter 1, Article 21, Sections 571 to 604, inclusive, as amended by Laws of Missouri, 1941, pp. 280, 281. Pertinent sections thereof are printed in Appendix to this petition, whereby and wherein, in substance and effect, the State of Missouri claims the right to impose a tax on the right of any individual to receive property, *In Re Rosing's Estate* (1935), 337 Mo. 544, 85 S. W. (2d) 495, when the transfer of any such property, real, personal or mixed, or any interest therein or income therefrom in trust or otherwise to persons not therein exempted, is made by a resident or by a non-resident of said state when such non-resident's property is within the state or within its jurisdiction by deed, grant, bargain, sale or gift made in contemplation of death of the grantor, vendor or donor, or intending to take effect in possession or enjoyment at or after such death; when the transfer is made by a resident or by a non-resident when such non-resident's property is within the state or within its jurisdiction in trust or otherwise, and the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of or the income from the property or (2) the right to designate the persons who shall possess or enjoy the income of the property therefrom (R. 8).

Also, at the time of the death of Madge Barney Blake, there was contained in the inheritance tax law of the State of Missouri a reciprocity statute, designated Section 576, *supra*, repealed, Laws of Missouri, 1939 page 182, which section is printed in Appendix of this petition, wherein and whereby, in substance and effect, it was provided in respect of personal property, that the tax imposed by said article shall not be payable (a) if the transferor at the time of his

death was a resident of a state which at the time of his death did not impose a transfer tax or death tax of any character in respect of property of residents of this state or (b) if the laws of the state of the residence of the transferor at the time of his death contained a reciprocal exemption provision under which non-residents were exempt from transfer taxes or death taxes of every character in respect of personal property, provided the state of the residence of such non-resident allowed a similar exemption to the residents of the state of residence of such transferor (R. 10).

At the time of the death of Madge Barney Blake, there was in effect in the Commonwealth of Massachusetts no law which imposed a transfer tax or death tax of any character, in respect of intangible personal property of residents of the State of Missouri, and the Commonwealth of Massachusetts did not at said time impose any such transfer tax or death tax (R. 11).

The identical facts, presented in the case sought to be reviewed, were heretofore before this Court in the case of *Commonwealth of Massachusetts* v. *State of Missouri et al.* (1939), 308 U. S. 1, 84 L. Ed. 3, 60 S. Ct. 39. The question presented in that case was whether a controversy existed between two states, and between a state and citizens of another state. This Court ruled that none existed that was enforceable in the Court; and, that the Commonwealth of Massachusetts was not without a proper and adequate remedy; thereafter, a suit was instituted in the District Court of the United States, for the Eastern Division of the Eastern Judicial District of Missouri against the St. Louis Union Trust Company, Charles B. Maloy and Clarence E. Maloy, as Trustees, under the trust indentures made by Madge Barney Blake, for the purpose of asserting inheritance taxes, and a judgment was rendered in favor of the Commonwealth of Massachusetts, in the aggregate sum of $85,050.00 (R. 89); thereafter, the amount of such judgment was duly satisfied (R. 39).

The facts involved in this case are not in dispute upon which the Supreme Court of the State of Missouri

based its decision and judgment and are set forth in the opinion of the Court (R. 116).

It was contended by the petitioners here in the trial of the case in the Circuit Court of the City of St. Louis, Missouri, that Section 576, *supra*, of the Revised Statutes of Missouri, 1929 was unconstitutional and void in that said statute violates Section 1 of the 14th Amendment to the Constitution of the United States. The Supreme Court of the State of Missouri in its opinion (R. 118) recognized that the defendant, one of the petitioners here, contended that Section 576, *supra*, was void because it worked to the denial of due process, and authorized non-uniformity of taxes upon the same class of subjects of taxation contrary to Section 1 of the 14th Amendment to the Federal Constitution, and held, that Section 576, *supra*, was not void on constitutional grounds. Such decision was based on the cases of *Connolly* v. *Union Sewer Pipe Co.*, (1902), 184 U. S. 540, 46 L. Ed. 679, 22 S. Ct. 431; *Carmichael et al.* v. *Southern Coal and Coke Co.*, (1937) 301 U. S. 495, 81 L. Ed. 1245, 57 S. Ct. 868; *Caskey Baking Co., Inc.* v. *Commonwealth of Virginia* (1941) 313 U. S. 117, 85 L. Ed. (Adv. Ops.) 831, 61 S. Ct. 881. It is this decision and judgment of the Supreme Court of the State of Missouri that is sought to be reviewed.

The record, upon which this petition is here presented, is composed of the printed case as used in the Supreme Court in the State of Missouri, being pages number 1 to 114 of the record as certified to this Court, together with the opinion of the Supreme Court of Missouri and the proceedings therein comprising pages lettered a to e, numbered 115 to 140 of the record as certified to this Court.

B.

Reasons Relied on for the Allowance of the Writ.

1. The question presented is the constitutionality of Section 576 of the Revised Statutes of Missouri, 1929, Laws of Missouri, 1939, page 182. The facts with respect to the question presented are not in dispute, and are contained in the record made before the Supreme Court of Missouri. Since no issue as to the facts was raised or presented in the State Courts of Missouri, none now exists, or is here presented; likewise, no question has been raised, and none exists as to the correctness of the procedure.

The controversy at issue, involved in the proceedings in the State Courts, and decided by the Supreme Court of Missouri in rendering the judgment sought to be reviewed, is whether Section 576, *supra*, conflicts with the provisions of Section 1 of the 14th Amendment to the Constitution of the United States, in that said section authorizes non-uniformity of taxation, upon the same class of subjects. This is solely a federal question of law to be decided by the decisions of this Court, and petitioners contend that the decision and judgment of the Supreme Court of Missouri upon such question is erroneous, and should be reversed.

2. The petitioners contend that no decisions of this Court directly or indirectly hold that Section 576, *supra* herein referred to as the reciprocity provision of the Inheritance Tax Laws of the State of Missouri, supports or sustains the holding of the Supreme Court of the State of Missouri.

3. Petitioners further contend that, although the precise question involved has not been passed upon by this Court, the decision of the Supreme Court of Missouri, holding that Section 576, *supra*, is valid, as not contravening the provisions of Section 1 of the 14th Amendment to the Constitution of the United States, is not in accord with applicable decisions of this Court, and assign the same as error, for which said decision should be reviewed and reversed.

4. The matter at issue is of widespread public importance, because of the fact it affects the exercise of the taxing powers of the states. Moreover, this Court has apparently subscribed, in the cases of *Curry* v. *McCanless*, (1939) 307 U. S. 357, 83 L. Ed. 1339, 59 S. Ct. 900 and *Graves* v. *Elliott* (1939), 307 U. S. 383, 83 L. Ed. 1356, 59 S. Ct. 913, to the doctrine previously announced in the case of *Blackstone* v. *Miller* (1903), 188 U. S. 189, 47 L. Ed. 439, 23 S. Ct. 277, respecting the taxation of intangibles in more than one state.

5. The decision and judgment of the Supreme Court of Missouri sought to be reviewed is in direct conflict with previous decisions of this Court in the cases of *Stebbins* v. *Riley* (1925), 268 U. S. 137, 69 L. Ed. 884, 45 S. Ct. 424; *Magoun* v. *Illinois Trust and Savings Bank et al.*, (1898), 170 U. S. 283, 42 L. Ed. 1037, 18 S. Ct. 594; *Old Dearborn Distributing Co.* v. *Seagram-Distillers* (1936), 299 U. S. 183, 81 L. Ed. 109, 57 S. Ct. 139; *Watson* v. *State Comptroller of New York* (1920), 254 U. S. 122, 65 L. Ed. 170, 41 S. Ct. 43; *Carmichael* v. *Southern Coal and Coke Co.* (1937), 301 U. S. 495, 81 L. Ed. 1245, 57 S. Ct. 868; *Maxwell* v. *Bugbee* (1919), 250 U. S. 525, 63 L. Ed. 1124, 40 S. Ct. 2; *Colgate* v. *Harvey* (1935) 296 U. S. 404, 80 L. Ed. 299, 56 S. Ct. 252; *Travis v. Yale & Towne Manufacturing Company* (1920) 252 U. S. 60, 64 L. Ed. 460, 40 S. Ct. 228. These decisions, while announcing the rule that the states are free to select their subjects of taxation and classify the same, nevertheless require, under the provisions of Section 1 of the 14th Amendment, that all members of the class be treated equally. Because the Supreme Court of Missouri has decided, by its opinion and judgment, that Section 576 of the Revised Statutes of Missouri, 1929 does not violate Section 1 of the 14th Amendment, its decision is in conflict with applicable decisions of this Court.

WHEREFORE, Your petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Missouri, commanding that Court to certify and send to

this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 37563, May Term, 1941, *St. Louis Union Trust Company, et al., Appellants* v. *The State of Missouri*, and that the said judgment of the Supreme Court of Missouri may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

ROY MCKITTRICK,
Attorney General of Missouri,

WILLIAM C. CONNETT, IV,
Assistant Attorney General of Missouri

RUSSELL C. STONE,
Assistant Attorney General of Missouri

Counsel for Petitioners.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Supreme Court of Missouri, filed July 21, 1941, is not, as yet, officially reported, 155 S. W. (2d) 107, (R. 115). Motion for Rehearing was overruled, October 30, 1941, (R. 139), and said opinion and judgment became final.

II.

Jurisdiction.

1. This petition is filed pursuant to Section 237b of the Federal Judicial Code (28 U. S. C. A. 344 (b)) which provides:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or *where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution*, treaties, or laws of the United States; *or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution*, or any treaty or statute *of*, or commission held or authority exercised under, the *United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied.* Nothing in this paragraph shall be construed to limit or detract from the right to a review on an appeal in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on an appeal might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph." (Emphasis ours.)

2. Petitioners also rely on Rule 38 of the Rules of this Court, and particularly on Paragraph 5 thereof, which provides in part:

> "5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be

granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered.

"(a) Where a State court has decided a Federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court."

3. The date of the judgment to be reviewed is July 21, 1941. (R. 115). Motion for Rehearing overruled, October 30, 1941. (R. 139).

4. It was contended by the petitioners here in the trial of the case in the Circuit Court of the City of St. Louis, Missouri, that Section 576 of the Revised Statutes of Missouri, 1929, Laws of Missouri, 1939, page 182, was unconstitutional and void, in that said statute violated the 14th Amendment to the Constitution of the United States. (R. 17, 20). The St. Louis Union Trust Company and Clarence E. and Charles B. Maloy, through counsel denied that said section was unconstitutional and void. (R. 19). The Supreme Court of Missouri, in its opinion (R. 118), recognized that the defendant there, one of the petitioners here, contended that Section 576, *supra*, was void because it worked to a denial of due process, and authorized non-uniformity of taxes upon the same class of subjects of taxation contrary to Section 1 of the 14th Amendment to the Federal Constitution. The Supreme Court of Missouri expressly held that Section 576, *supra*, was not void on constitutional grounds (R. 125), and based its decision and judgment on the cases of *Connolly* v. *Union Sewer Pipe Company* (1902), 184 U. S. 540, 46 L. Ed. 679, 22 S. Ct. 431; *Carmichael et al.* v. *Southern Coal & Coke Co.* (1937), 301 U. S. 495, 81 L. Ed. 1245, 57 S. Ct. 868; *Caskey Baking Co., Inc.* v. *Commonwealth of Virginia* (1941) 313 U. S. 117, 85 L. Ed. (Adv. Ops.) 831, 61 S. Ct. 881. It appears

therefore, that the Supreme Court of the State of Missouri has expressly held that Section 576, *supra*, is not invalid on the basis of any conflict with the provisions of Section 1 of the 14th Amendment to the Constitution of the United States, as interpreted by this Court.

5. The cases, upon which the petitioners rely in support of jurisdiction, are:

Blodgett v. *Silberman et al.* (1928), 277 U. S. 1, 72 L. Ed. 749, 48 S. Ct. 410;

Boynton v. *Hutchinson Gas Co.* (1934), 291 U. S. 656, 78 L. Ed. 1048, 54 S. Ct. 457;

Kelly v. *Washington ex rel. Foss Company, Inc.* (1937), 302 U. S. 1, 82 L. Ed. 3, 58 S. Ct. 87;

Coleman et al. v. *Miller et al.* (1939), 307 U. S. 433, 83 L. Ed. 1385, 59 S. Ct. 972;

State of Wisconsin and Elmer E. Barlow, as Commissioner of Taxation of the State of Wisconsin v. *J. C. Penny Company* (1940), 311 U. S. 435, 85 L. Ed. (Adv. Ops.) 222, 61 S. Ct. 246;

People of State of California v. *Thompson* (1941), 312 U. S. 672, 61 S. Ct. 711, 85 L. Ed. (Adv. Ops.) 793;

State of Alabama v. *King and Boozer* (not as yet officially reported) (1941), 86 L. Ed. (Adv. Ops.) 1, 62 S. Ct. 43.

III.

Statement of the Case.

This suit was initiated by the St. Louis Union Trust Company and Charles B. Maloy and Clarence E. Maloy, as Co-trustees, in the Circuit Court of the City of St. Louis, Missouri, under the provisions of Section 598 of the Revised Statutes of Missouri, 1929, now of 1939, for the purpose of determining whether the State of Missouri has a lien upon the assets of certain trust estates for inheritance taxes. It was submitted upon an agreed statement of facts, and the

Circuit Court for the City of St. Louis, Missouri, on the 12th day of December, 1940, found that the trust estates were liable for inheritance taxes in Missouri in the total sum of $182,349.69. (R. b, c).

Upon an appeal from the judgment of the Circuit Court of the City of St. Louis, Missouri, the Supreme Court of the State of Missouri reversed the judgment of the Circuit Court, and held that the State of Missouri was not entitled to assert a lien on the assets of certain trust estates (R. 126).

The facts upon which the Supreme Court of Missouri predicated its decision and judgment are set out as follows in the Court's Opinion (R. 116):

> "February 14, 1921, and January 11, 1929, Madge Barney Blake, a resident of Massachusetts, created a trust with the St. Louis Union Trust Company, a plaintiff herein, as trustee. May 20, 1935, she created a trust with plaintiff company and Charles B. and Clarence E. Maloy as cotrustees. The assets of the trusts created January 11, 1929, and May 20, 1935, were derived from the income of the trust of February 14, 1921. Mrs. Blake, still a resident of Massachusetts, died July 12, 1935.
>
> "* * * * * * * * * * * * * * * * *
>
> "The assets in the trust estates were intangible personal property consisting of various stocks, bonds, United States treasury notes, etc. At the time of Mrs. Blake's death, the value of the assets of the three trusts was respectively, $1,513,864.51, $136,472.73, and $200,452.53; total, $1,850,789.77. Mrs. Blake was to receive, for life, the net income from each trust estate. Each of the trusts provided for complete disposition of assets upon the death of Mrs. Blake.
>
> "At the time of the death of Mrs. Blake, there was a Massachusetts statute (Sec. 1, Ch. 65, Gen. Laws, Tercentenary Ed.) providing for a tax upon legacies

and successions affecting property 'within the jurisdiction' of Massachusetts, and 'belonging to inhabitants' thereof, and Massachusetts, domicile of Mrs. Blake, asserted the right to tax the devolution of the respective trust assets, and to enforce such claim, brought suit in the federal district court at St. Louis, against the trustees, the St. Louis Union Trust Company and the Maloys. That cause was settled and judgment entered in favor of Massachusetts in the total sum of $85,050. This judgment was paid, plus an additional $4,000, 'all of which payments were on account of said claim (of Massachusetts) for inheritance taxes in respect of said trust estates.' It was stipulated in the present case that Massachusetts does not tax intangible personal property within the jurisdiction of the state, but belonging to nonresident decedents, even though such property is held by a Massachusetts trust company under a trust created by the nonresident decedent."

IV.

Specification of Errors.

1. The Supreme Court of Missouri erred in declaring and decreeing that the Inheritance Tax Law of the State of Missouri did not create a lien on the assets of the trust estates created by Madge Barney Blake, for inheritance taxes in the sum of $182,349.69.

2. The Supreme Court of Missouri erred in declaring and decreeing that Section 576 of the Revised Statutes of Missouri, 1929, Laws of Missouri, 1939, page 182, being a part of the Inheritance Tax Laws of said state, did not violate Section 1 of the 14th Amendment to the Constitution of the United States. The Court should have declared and decreed that such statute was unconstitutional and void, because carving out of a valid classification established by Section 573 of the Revised Statutes of Missouri, 1939, another and distinct classification, resulting in the nonuniformity of taxation of members within the class.

V.

ARGUMENT.

Summary of Argument.

Point A. The decision and judgment by the Supreme Court of the State of Missouri, in the case sought to be reviewed, is contrary to the requirements of Section 1 of the 14th Amendment to the Constitution of the United States, and is in conflict with prior decisions of this Court construing such Amendment, in that, whenever a state resorts to a classification of subjects, for the purposes of taxation, such classification must be reasonable, not arbitrary, and rest upon some ground of difference having a fair and substantial relation to the subject of the legislation, so that all persons similarly circumstanced shall be treated alike.

Point B. The Missouri Statute, Section 576 of the Revised Statutes of Missouri, 1929, denies to the citizens of the several states, which states have not enacted a transfer tax or death tax of any character in respect of residents of Missouri, or a similar reciprocal exemption statute, equal protection of the Laws of the State of Missouri, so that all members of the class subject to taxation will not be treated equally.

Point A.

The decision and judgment by the Supreme Court of the State of Missouri in the case sought to be reviewed is contrary to the requirements of Section 1 of the 14th Amendment to the Constitution of the United States, and is in conflict with prior decisions of this Court construing such Amendment, in that whenever a state resorts to a classification of subjects, for the purposes of taxation, such classification must be reasonable, not arbitrary, and rest

upon some ground of difference having a fair and substantial relation to the subject of the legislation, so that all persons similarly circumstanced shall be treated alike.

It has long been regarded as axiomatic since the decision of this Court in the very early case of *Mager* v. *Grima et al.* (1850), 49 U. S. 490, 12 L. Ed. 1168, that a state may regulate the manner and terms upon which property, both real and personal within its jurisdiction, may be transmitted by last will and testament, or by inheritance; and providing, who may take and who shall not. In other words, the state is untrammeled in its power to tax the privilege of succeeding to the property of a decedent. In imposing the tax, the state may classify the type and kind of property transferred or received, or the amount or value of property transferred or received, or the relationship of transferees, or the character of the transferees. *Watson v. State Comptroller of New York* (1920), 254 U. S. 122, 65 L. Ed. 170, 41 S. Ct. 43.

That power however, as pointed out by Mr. Justice Stone in the case of *Stebbins* v. *Riley* (1925), 268 U. S. 137, 69 L. Ed. 884, 45 S. Ct. 424, is subject to the limitation of Section 1 of the 14th Amendment to the Constitution of the United States, in that, the taxing act must operate equally on persons, according to their relations. The Justice quoted approvingly from the case of *Magoun v. Illinois Trust and Savings Bank et al.* (1898), 170 U. S. 283, 42 L. Ed. 1037, 18 S. Ct. 594, and said:

> " 'It only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations. In some circumstances it may not tax A more than B, but if A be of a different trade or profession than B, it may . . . . . In other words, the state may distinguish, select, and classify objects of legislation, and necessarily this power must have a wide range of discretion.' "

And then, laid down the rule, which we strenuously assert has been violated by the Supreme Court of Missouri in its decision and judgment, in the following language:

> "The taxing statute may, therefore, make a classification for purposes of fixing the amount or incidence of the tax, provided only that all persons subjected to such legislation within the classification are treated with equality, and provided further that the classification itself be rested upon some ground of difference having a fair and substantial relation to the object of the legislation. * * *"

In the most recent case of *Carmichael, et al. v. Southern Coal & Coke Co.*, (1937), 301 U. S. 495, 81 L. Ed. 1245, 57 S. Ct. 868, Mr. Justice Stone again emphasized the range which state taxing statutes may take in the selection of subjects for taxation, and reiterated the rule announced in the case of *Stebbins v. Riley, supra.* Within the limits of the argument, here permitted, it would be impossible to analyze each of the decisions by this Court construing the taxing power of states, and to show that none of such decisions sanction the enactment of any statute, which may be said to be comparable to Section 576 of the Revised Statutes of Missouri, Laws of Missouri, 1939, page 182. Suffice it to say, that the decisions of this Court, before referred to, announcing the principle of classification and the limits within which a state may classify, clearly show that Section 576, *supra*, is in conflict with the provisions of Section 1 of the 14th Amendment to the Constitution of the United States, and the decisions of this Court construing such Amendment.

That the Legislature of Missouri was mindful of the requirements of the 14th Amendment, in the respects before noticed, is demonstrated by the fact that Section 572 of the Revised Statutes of Missouri, 1929, now Section 573 of the Revised Statutes of Missouri, 1939, as printed in Appendix, only imposes a tax at a certain rate on persons

therein named, measured by the amount of property received at its clear market value at the date of the death of decedent. The rates of tax could vary in each estate, depending upon the relationship of the persons to the decedent. *In re: Rosing's Estate* (1935), 337 Mo. 544, 85 S. W. (2d) 495. It is therefore apparent, that such classification of persons for the purpose of an inheritance tax is embraced within the doctrine of classification sanctioned by this Court in the cases of *Magoun* v. *Illinois Trust and Savings Bank et al.; Stebbins* v. *Riley* and *Watson* v. *State Comptroller of New York, supra*, because it operates equally between all members of the classes, whether resident or non-resident, depending upon their relationship to the decedent, and the amount of property received. Nevertheless, the Supreme Court of Missouri, in its opinion, in the case sought to be reviewed, ignores these principles.

Point B.

The Missouri Statute, Section 576 of the Revised Statutes of Missouri, 1929, denies to the citizens of the several states, which states have not enacted a transfer tax or death tax of any character in respect of residents of Missouri, or a similar reciprocal exemption statute, equal protection of the laws of the State of Missouri, so that all members of the class subject to taxation will not be treated equally.

It is provided by Section 576 of the Revised Statutes of Missouri, 1929, Laws of Missouri, 1939, page 182, as follows:

> "The tax imposed by this article in respect of personal property (except tangible personal property having an actual situs in this state) shall not be payable (a) if the transferor at the time of his death was a resident of a state or territory of the United States, or of any foreign country, which at the time of his death did not impose a transfer tax or death tax of any character in respect of property of residents of this state (except tangible personal property having an actual situs in

such state or territory or foreign country), or, (b) if the laws of the state, territory or country of residence of the transferor at the time of his death contained a reciprocal exemption provision under which non-residents were exempted from transfer taxes or death taxes of every character in respect of personal property (except tangible personal property having an actual situs therein), provided the state, territory or country of residence of such non-residents allowed a similar exemption to residents of the state, territory or country of residence of such transferor. For the purposes of this section the District of Columbia and possessions of the United States shall be considered territories of the United States. The terms 'foreign country' and 'country' as used herein shall mean both any foreign country and any political subdivision thereof, and either of them of which the transferor was domiciled therein at the time of his death."

(1) *The Missouri Statute, viewed historically from the standpoint of the decisions of this court, presents a matter of wide public interest.*

The challenged section of the Missouri Inheritance Tax Law becomes increasingly important, in light of its history. This is true when it is considered that, its enactment is one of the results of the decision by this Court in the case of *Blackstone* v. *Miller* (1903), 188 U. S. 189, 47 L. Ed. 439, 23 S. Ct. 277, respecting the taxation of intangibles in more than one state. The holding of this Court in that case remained the law until the decision of this Court in the case of *Farmers Loan and Trust Company* v. *Minnesota* (1930), 280 U. S. 204, 74 L. Ed. 371, 50 S. Ct. 98. While this Court from 1903 to 1930 was charting the course within which the state's power to tax could be exercised, some thirty-four states had joined in a movement which would achieve only a single place of taxation of intangibles, under varying circumstances. The phrase, "varying circumstances" is used advisedly, and seems adequately to serve as an approach

to the question for decision. See 28 Columbia Law Review 806; 43 Harvard Law Review 641; 18 Boston University Law Review 39.

It should also be noticed historically, that members of this Court (Mr. Chief Justice Stone, Mr. Justice Holmes and Mr. Justice Frankfurter) have also recognized the need for a common scheme, *Kidd* v. *Alabama*, (1903), 188 U. S. 730, 732, 47 L. Ed. 669, 23 S. Ct. 401, compact, 34 Yale L. J. 685, or equitable and reciprocal means, *First National Bank of Boston* v. *Maine* (1932), 284 U. S. 312, 76 L. Ed. 313, 52 S. Ct. 174; *Curry* v. *McCanless* (1939), 307 U. S. 357, 83 L. Ed. 1339, 59 S. Ct. 900, whereby taxation of the same property in separate jurisdictions could be eliminated.

By 1932 the need for reciprocity between the several states, providing for a single place of taxation of intangibles, became unnecessary, in light of this Court's decision in *First National Bank of Boston* v. *Maine*, *supra*. In that case, it was held that intangible personal property could only be subjected to inheritance taxes at the domicile of the decedent, excepting however, where such property may have acquired a situs other than that of the owner's domicile. See also, *Baldwin et al.* v. *Missouri* (1930), 281 U. S. 586, 74 L. Ed. 1056, 50 S. Ct. 436.

It is to be seen therefore, that the various reciprocal statutes assumed a cloak of superfluousness; but as far as Missouri was concerned, the reciprocal statute, presented in the case here sought to be reviewed, was not repealed until 1939. Laws of Missouri, 1939 p. 182. Since, however, the recent decision by this Court in the cases of *Curry* v. *McCanless*, *supra*, and *Graves* v. *Elliott* (1939), 307 U. S 383, 83 L. Ed. 1356, 59 S. Ct. 913, once again, this type of legislation becomes increasingly important, in order that the problem of double taxation of the same property in separate jurisdictions may be avoided. Missouri has met the problem from a constitutional aspect, as well as a practical one, *Farmers Loan and Trust Company v. Minn.*, *supra*, by exempting, in the measure of the tax, intangible

personal property of non-residents (R. 125). We say measure of the tax, because the tax is not imposed on the property, as such. It is imposed on the right measured by the amount of property received, *In Re: Rosing's Estate*, 337 Mo. 544, 85 S. W. (2d) 495. In order to secure the amount of the taxes, a lien attaches to the property received. Sections 578, 593 and 598, of Revised Statutes of Missouri, 1939.

A model reciprocity statute, such as the one presented in the case sought to be reviewed, we respectfully submit, is not without constitutional infirmity, and is apparently still in force in at least 33 states. See 18 Boston University Law Review 39 (1938). Consequently, the character of the constitutional question presented should challenge this Court's attention, because the Supreme Court of Missouri has decided a federal question of substance, in such a way as not to be in accord with applicable decisions of this Court.

(2) *The effect of the Missouri Statute is to tax non-residents, while exempting residents; and to exempt certain non-residents and tax other non-residents.*

In our consideration of the challenged section of the Missouri Statute, it is not amiss to observe the language of the Supreme Court of Missouri in construing such section (R. 125). It was said:

> "We think defendant fails to appreciate that our reciprocity statute did *not deal* with the *persons* to whom intangibles may pass upon the death of the owner, but it dealt with *states* which did not impose an inheritance tax upon intangibles in such states and owned by residents of this state at time of death. The classification of intangible personal property for the purpose of taxation or non-taxation, under the act, is based upon the ownership thereof and whether the owner, the transferor under the statute, is or is not a resident of a state, at the time of his death, which does or does not impose a tax upon intangibles in such state

and owned by a resident of this state at the time of his death. We cannot appreciate how such could create a class within a class or work to nonuniformity as defendant contends. * * "

That such statute did deal with states may be admitted. On the other hand, in determining whether or not constitutional infirmity exists, its effect on the persons exempted from or liable for the exaction must be considered. *State of Wisconsin* v. *J. C. Penny Co.* (1940), 311 U. S. 435, 85 L. Ed. (Adv. Ops.) 222, 61 S. Ct. 246.

The statute, as we see it, exempts citizens of the several states which do not have a *transfer tax or death tax of any character*, in respect of property of citizens of this state. It solicits the citizens of the several states to enact a similar reciprocal exemption statute, in order that the citizens of the State of Missouri may be exempted in the several states, in respect of their property.

The holding of the Supreme Court of Missouri to the effect that the basis for the classification of intangible personal property and the consequent exemption is made to depend (1) on the transferor's domicile and (2) whether the state of domicile exempts residents of Missouri, results in unjust and oppressive consequences, so that it squarely conflicts with Section 1 of the 14th Amendment to the Constitution of the United States, because:

(a)

The basis for the exemption is made to depend upon the forbearance of enactment of a transfer tax or death tax of any character, in respect of property of citizens of this state. This reason, standing alone, could be fertile field for variant administrative and judicial rulings.

(b)

The passage, by other states, of similar reciprocal exemption laws would likewise support variant administrative and judicial rulings.

(c)

The transferor's residence is without fair and substantial relation to the subject of the tax, because the Supreme Court of Missouri has held that subject of the tax is on the right of heir or legatee to receive, *In re: Rosing's Estate, supra,* and not on the right to transfer or transmit property, at or after death.

(d)

It discriminates between different classes of non-residents, thereby creating a class within a class, and denying to those discriminated against equal protection of the laws.

(e)

Equal protection of the laws is not achieved as between residents and non-residents as classes.

Lettered reasons (a) and (b) seem to demonstrate how arbitrary and hostile such a classification may be, when the right to the exemption may depend upon the whim or caprice of the tax administrators in making the determination of whether or not there be a transfer tax or death tax within the state of the domicile of the decedent, or a similar reciprocal exemption statute, which exempts citizens of the State of Missouri in respect of their property. See, 43 Harvard Law Review 641. Likewise, judicial decisions could conceivably rest upon the application of rules of statutory construction e. g., strict or liberal, in determining the legislative intention, *In Re: Kansas City Star Company* (1940), 346 Mo. 658, 142 S. W. (2d) 1029, and thereby defeat the right of a non-resident heir or legatee to be exempted from the payment of the tax. It is further submitted that the discrimination, which could result from variant administrative and judicial rulings, is hostile, rather than incidental or occasional. *Maxwell* v. *Bugbee* (1919), 250 U. S. 525, 63 L. Ed. 1124, 40 S. Ct. 2. Hence, the basis upon which the Supreme Court of Missouri announced its

decision in the case sought to be reviewed shows how unreasonable the classification may be in its effect.

In consideration of reason lettered (c), we submit that the power of the state to impose a tax on the right to receive property is not dependent upon the death of the decedent in that state, and none of the cases decided by this Court emphasize that fact. *Graves* v. *Elliott* (1939), 307 U. S. 383, 83 L. Ed. 1356, 59 S. Ct. 913; *Bullen* v. *Wisconsin* (1916), 240 U. S. 625, 60 L. Ed. 830, 36 S. Ct. 473. If, however, the state has jurisdiction to impose a tax upon property, such as here involved, a tax may be imposed upon the devolution by death, of such property, *Rhode Island Hospital Trust Company* v. *Doughton* (1926), 270 U. S. 69, 70 L. Ed. 470, 46 S. Ct. 256; *Snyder* v. *Bettman* (1903), 190 U. S. 249, 47 L. Ed. 1035, 23 S. Ct. 803, upon the theory of benefit and protection. *Graves* v. *Elliott*, *supra*. Since therefore, the Supreme Court of Missouri has held that the tax is imposed upon the right of the heir or legatee to receive property, *In re: Rosing's Estate*, *supra*, it follows that when the exemption from the tax is made to depend upon the residence of the transferor, that such residence is without fair or substantial relation to those who are required to pay the tax, *Colgate* vs. *Harvey* (1935), 296 U. S. 404, 80 L. Ed. 299, 56 S. Ct. 252. Consequently, the statute, as construed by the Supreme Court of Missouri, with respect to the classification of the intangible personal property being dependent upon the transferor's residence demonstrates that such classification is without rationale since, clearly, the inheritance tax law was enacted to raise revenue.

Of (c) and (d)—under point A of this Argument, we asserted that the inheritance tax of the State of Missouri was imposed, based upon the relationship of the heir or legatee to the decedent, which tax was measured by the amount of property received, and the tax being increased progressively as the amount of the benefit increased. The tax applies to residents or non-residents. It is to be seen however, that if the tax imposed by Section 573 of the

Revised Statutes of Missouri, 1939, shall not be payable by certain non-resident heirs or legatees under the provisions of the challenged section here, Section 576, *supra*, then other non-resident heirs or legatees within the same classification would be taxed. Thus, the challenged section discriminates between members of the same class of non-residents, creating a class within a class, and resulting in non-uniformity of taxation. On the other hand, it may be urged that as between a resident heir or legatee of Missouri and a resident heir and legatee of Massachusetts, that equality of treatment is achieved, since Massachusetts has not, and does not impose a tax on Missouri residents, and Missouri does not impose a tax on residents of Massachusetts. Nevertheless, this fact stands out: *Missouri is the taxing state*, and must treat *all* non-residents within the class on an equal basis, without regard to the difference of residence.

The inequality and discriminatory treatment of non-residents, in the interest of brevity, is clearly apparent, when illustrated, as follows:

I.

In 1930, "A", domiciled in a reciprocal state created a trust of intangibles in the sum of $20,000.00, in Missouri, the taxing state, reserving the income therefrom during his life, the principal of the trust to go to his son, "B", a non-resident of the State of Missouri.

II.

In 1930, "C", domiciled in a non-reciprocal state created a trust of intangibles in the sum of $20,000.00, in Missouri, the taxing state, reserving the income therefrom during his life, the principal of the trust to go to his son, "D", a non-resident of the State of Missouri.

III.

In 1930, "X", domiciled in a reciprocal state created a trust of intangibles in the sum of $20,000.00, in Missouri, the taxing state, reserving the income therefrom during his life, the principal of the trust to go to his son, "Y", a resident of the State of Missouri.

From the above illustrations, "B", "D" and "Y" are all within the same class, contemplated by the provisions of Section 573, and would be subjected to the payment of a tax at the rate of 1% of the value of the property received, whether tangible or intangible. Yet, under the provisions of Section 576, *supra*, "B" and "Y" would not be required to pay a tax, while "D", within the same class as "B" and "Y", would be subjected to a tax, resulting in discrimination as between "B" and "D", and a denial of equal protection of the laws as between "Y" and "D". *Maxwell* v. *Bugbee* (1919), 250 U. S. 525, 63 L. Ed. 1124, 40 S. Ct. 2; *Stebbins* v. *Riley* (1925), 268 U. S. 137, 69 L. Ed. 884, 45 S. Ct. 424, *Travis* v. *Yale & Towne Manufacturing Company* (1920) 252 U. S. 60, 64 L. Ed. 460, 40 S. Ct. 228.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that to such end a writ of certiorari should be granted, and this Court should review the decision of the Supreme Court of Missouri, and finally reverse it.

ROY McKITTRICK,
Attorney-General,

WILLIAM C. CONNETT, IV,
Assistant Attorney-General,

RUSSELL C. STONE,
Assistant Attorney-General.

APPENDIX.

Revised Statutes of Missouri, 1939, Chapter 1, Article 21, Sections 571 to 604, as amended by Laws of Missouri, 1941, pp. 280 and 281, and Section 576 of the Revised Statutes of Missouri, 1929, Laws of Missouri, 1939, p. 182, provided:

"Section 571. Property subject to inheritance tax —exceptions.—A tax shall be and is hereby imposed upon the transfer of any property, real, personal or mixed, or any interest therein or income therefrom, in trust or otherwise, to persons, institutions, associations or corporation, not hereinafter exempted, in the following cases: When the transfer is by will or by the intestate laws of this state from any person dying possessed of the property while a resident of the state. When the transfer is by will, or intestate law of property within the state or within the jurisdiction of the state and decedent was a non-resident of the state at the time of his death. When the transfer is made by a resident or by a non-resident when such non-resident's property is within this state or within its jurisdiction, by deed, grant, bargain, sale or gift made in contemplation of the death of grantor, vendor or donor, or intending to take effect in possession or enjoyment at or after such death. Every transfer by deed, grant, bargain, sale or gift made within two years prior to the death of grantor, vendor or donor, of a material part of his estate or in the nature of a final disposition or distribution thereof without an adequate valuable consideration shall be construed to have been made in contemplation of death within the meaning of this section. When the transfer is made by a resident or by a non-resident when such non-resident's property is within this state or within its jurisdiction, in trust or otherwise and the transferor has retained for his life or any period not ending before his death, (1) the possession or enjoy-

ment of or the income from the property, or (2) the right to designate the persons who shall possess or enjoy the property or income therefrom, except in case of a *bona fide* sale for an adequate and full consideration in money or money's worth. Such tax shall be imposed when any person, association, institution or corporation actually comes into the possession and enjoyment of the property, interest therein or income therefrom, whether the transfer thereof is made before or after the passage of this law: *Provided*, that property which actually vested in such persons or corporations before this law takes effect shall not be subject to the tax, *and provided further* that nothing herein contained shall be construed as imposing a tax upon any transfer as defined in this Act, of intangibles, however used or held, whether in trust or otherwise, by a person, or by reason of the death of a person, who was not a resident of this state at the time of his death."

"Sec. 573. Twenty thousand or less—rates.—When property, or any beneficial interest therein or income therefrom passes by any such transfer where the amount of property, interest or income shall exceed in value the exemption hereinafter specified and shall not exceed in value twenty thousand dollars, the tax hereby imposed shall be as follows:

"(1) One per cent.—Where the person or persons to whom such property or any beneficial interest therein passes, shall be the husband, wife, lineal descendent, or any lineal ancestor of the decedent, or any legally adopted child or any lineal descendant of such adopted child, or child born out of lawful wedlock, at the rate of one per centum of the clear market value of such property or interest therein.

"(2) Three per cent.—Where the person or persons to whom such property or any beneficial interest therein passes shall be the brother or sister, or the descendant of a brother or sister of the decedent, the wife or widow of a son, or the husband of a daughter of the decedent, at the rate of three per centum of the clear market value of such property or interest therein.

"(3) Three per cent.—Where the person or persons to whom such property or any beneficial interest therein passes shall be the brother or sister of the father or mother of the decedent, or a descendant of a brother or sister of the father or mother of the decedent, at the rate of three per centum of the clear market value of such property or beneficial interest therein.

"(4) Four per cent.—Where the person or persons to whom any such property or beneficial interest therein passes shall be the brother or sister of the grandfather or grandmother of the decedent or a descendant of the brother or sister of the grandfather or grandmother of the decedent at the rate of four per centum of the clear market value of such property or beneficial interest therein.

"(5) Five per cent—other rates.—Where the person or persons to whom such property or any beneficial interest therein passes shall be in any other degree of collateral consanguinity than as hereinbefore stated, or shall be a stranger in blood to the decedent, or shall be a body politic, association, institution, or corporation, at the rate of five per centum of the clear market value of such property or interest therein.

"(6) When the amount of the clear market value of such property or interest therein exceeds twenty thousand dollars the rates of taxes upon such excess shall be as follows: Upon all in excess of twenty thousand dollars and up to forty thousand dollars two times the rates fixed in the preceding subdivisions of this section. Upon all in excess of forty thousand dollars and up to eighty thousand dollars, three times the rates fixed in the preceding subdivisions of this section. Upon all in excess of eighty thousand dollars and up to two hundred thousand dollars, four times the rates fixed in the preceding subdivisions of this section. Upon all in excess of two hundred thousand dollars and up to four hundred thousand dollars, five times the rates fixed in the preceding subdivisions of this section.

Upon all in excess of four hundred thousand dollars, six times the rates fixed in the preceding subdivisions of this section."

"Sec. 604, interalia. Defining the words 'estate,' 'property' and 'transfer' etc.—The words 'estate' and 'property' as used in this article shall be taken to mean the real and personal property or interest therein of the testator, intestate, grantor, bargainor, vendor, or donor passing or transferred to individual legatee, devisees, heirs, next of kin, grantees, donees, vendees, or successors, and shall include all personal property within or without the state. * * * *"

"Sec. 576. Reciprocity.—The tax imposed by this article in respect of personal property (except tangible personal property having an actual situs in this state) shall not be payable (a) if the transferor at the time of his death was a resident of a state or territory of the United States, or of any foreign country, which at the time of his death did not impose a transfer tax or death tax of any character in respect of property of residents of this state (except tangible personal property having an actual situs in such state or territory or foreign country), or, (b) if the laws of the state, territory or country of residence of the transferor at the time of his death contained a reciprocal exemption provision under which non-residents were exempted from transfer taxes or death taxes of every character in respect of personal property (except tangible personal property having an actual situs therein), provided the state, territory or country of residence of such non-residents allowed a similar exemption to residents of the state, territory or country of residence of such transferor. For the purpose of this section the District of Columbia and possessions of the United States shall be considered territories of the United States. The terms 'foreign country' and 'country' as used herein shall mean both any foreign country and any political subdivision thereof, and either of them of which the transferor was domiciled therein at the time of his death."

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DEC 26

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 797.

STATE OF MISSOURI and ROY McKITTRICK, as Attorney General of Missouri, Petitioners,

vs.

ST. LOUIS UNION TRUST COMPANY, Trustee Under Indenture of Trust Made February 14, 1921, by Madge Barney Blake,

ST. LOUIS UNION TRUST COMPANY, Trustee Under Indenture of Trust Made January 11, 1929, by Madge Barney Blake,

ST. LOUIS UNION TRUST COMPANY, CHARLES B. MALOY and CLARENCE E. MALOY, Trustees Under Indenture of Trust Made May 20, 1935, by Madge Barney Blake, Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Missouri.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

DANIEL N. KIRBY,
ALLEN C. ORRICK,
HARRY W. KROEGER,
of St. Louis, Missouri,
Counsel for Respondents.

CHARLES M. ROGERSON,
of Boston, Massachusetts,
Of Counsel.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 797.

STATE OF MISSOURI and ROY McKITTRICK, as Attorney General of Missouri, Petitioners,

vs.

ST. LOUIS UNION TRUST COMPANY, Trustee Under Indenture of Trust Made February 14, 1921, by Madge Barney Blake,

ST. LOUIS UNION TRUST COMPANY, Trustee Under Indenture of Trust Made January 11, 1929, by Madge Barney Blake,

ST. LOUIS UNION TRUST COMPANY, CHARLES B. MALOY and CLARENCE E. MALOY, Trustees Under Indenture of Trust Made May 20, 1935, by Madge Barney Blake, Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Missouri.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

OPINION BELOW.

The opinion of the Supreme Court of Missouri (R. 116) is not yet officially reported, but is unofficially reported in 155 S. W. (2d) 107.

JURISDICTION.

The judgment of the Supreme Court of Missouri (R. 115) was entered on July 21, 1941. A motion for rehearing was filed on July 31, 1941 (R. 126), and overruled on October

30, 1941 (R. 139). The petition for writ of certiorari was filed on December 12, 1941. The petitioners seek to invoke the jurisdiction of this court under Section 237 (b) of the Judicial Code [28 U. S. C. A., § 344 (b)].

STATUTE INVOLVED.

The statute here involved is Section 576, R. S. Mo. 1929, which reads as follows (applicable portion being italicized):

> "Sec. 576. Reciprocity.—The tax imposed by this article in respect of personal property (except tangible personal property having an actual situs in this state) shall not be payable (a) *if the transferor at the time of his death was a resident of a state or territory of the United States, or of any foreign country, which at the time of his death did not impose a transfer tax or death tax of any character in respect of property of residents of this state (except tangible personal property having an actual situs in such state or territory or foreign country)*, or, (b) if the laws of the state, territory or country of residence of the transferor at the time of his death contained a reciprocal exemption provision under which nonresidents were exempted from transfer taxes or death taxes of every character in respect of personal property (except tangible personal property having an actual situs therein), provided the state, territory or country of residence of such nonresidents allowed a similar exemption to residents of the state, territory or country of residence of such transferor. * * *" (Laws 1929, p. 102).

STATEMENT.

The facts, as stipulated (R. 27), may be summarized as follows:

Mrs. Blake died on July 12, 1935, a resident of Massachusetts (Stip. § 2, R. 28), leaving a last will and testament which was admitted to probate by the Probate Court of

the County of Suffolk, Massachusetts, on October 21, 1935 (Stip. § 9, R. 36).

On February 14, 1921, January 11, 1929, and May 20, 1935 (respectively), Mrs. Blake, while a resident of Massachusetts, created three inter vivos trusts, with St. Louis Union Trust Company, as trustee [Stip. §§ 3, 4 and 5 (R. 29-32); Exhibit 1 (R. 43); Exhibit 5 (R. 63); Exhibit 6 (R. 66)].

Under such trusts, respondent trustees held, at the death of Mrs. Blake, property then valued as follows:

Trust of February 14, 1921	$1,513,864.51
Trust of January 11, 1929	136,472.73
Trust of May 20, 1935	200,452.53
Total	$1,850,789.77

(Stip. § 8, R. 35.)

The assets of such trusts consisted, at the time of their creation and at the time of Mrs. Blake's death, exclusively of intangible personal property, i. e., stocks, bonds, notes, etc. (Stip. § 8, R. 35).

Mrs. Blake reserved the right to receive the net income of the various trust estates during her lifetime (R. 45, 64, 67) and the rights to revoke those dated in 1921 and 1935 (R. 56, 70). She never exercised those rights to revoke (Stip. § 6, R. 32-33).

The trust instruments made a complete disposition of the income and principal of the trusts, providing that upon the death of Mrs. Blake certain special trust estates be set up for the benefit of individuals, with the residue (and remainders after the termination of some of the special trusts) going to charitable institutions existing under the laws of Missouri and under the laws of other states.

From the time of the creation of the trusts to the time of Mrs. Blake's death, the St. Louis Union Trust Company had possession of and managed and controlled the trust estates (Stip. § 7, R. 33). The property was in the possession of St. Louis Union Trust Company in Missouri when Mrs. Blake died, and upon her death the trustees continued to carry out the terms of the trusts (Stip. § 8, R. 35).

The Massachusetts inheritance tax law in effect at the time of Mrs. Blake's death (now set forth in General Laws of Massachusetts, Chapter 65) is set forth as Exhibit 13 to the Stipulation (R. 86-89). It taxes all property within the jurisdiction of Massachusetts belonging to inhabitants of Massachusetts and all real estate and tangible personal property within Massachusetts belonging to nonresidents, with exceptions not here material. It does not tax intangible personal property within the jurisdiction of Massachusetts belonging to nonresident decedents. No such tax has been imposed since 1929 (Stip. § 12, R. 39).

The administrative practice of the tax authorities in Massachusetts is in accordance with the statute. Under such practice, intangible personal property of a nonresident decedent, although held by a Massachusetts trust company upon revocable trust created by the decedent, is not taxed [R. 40; Exhibit 15 (R. 91); Exhibit 16 (R. 92)].

Massachusetts, as the state of the domicile of Mrs. Blake, asserted the right to tax the devolution of the trust properties here involved on the ground that they constituted gifts to take effect at or after death. It brought suit upon its claim in the United States District Court for the Eastern District of Missouri. Pursuant to stipulation of settlement of such suit, the trustees paid $89,050.00 Massachusetts inheritance taxes in respect of the trust properties here involved (Stip. § 11, R. 37-39).

The history of the instant litigation may be summarized as follows:

On November 8, 1939, the respondents, as trustees of the three trust estates created by Madge Barney Blake, brought a statutory proceeding (under Section 598, R. S. Mo. 1929) in the Circuit Court of the City of St. Louis, Missouri, against the State of Missouri to quiet title to the trust property against the lien or claim of lien of the State of Missouri for inheritance taxes (R. 2). The action was brought on the ground, among others, stated in the petition (R. 10, 13-14), that the trust property (being exclusively intangible personal property) was exempt from inheritance taxes under the reciprocal exemption contained in Section 576, R. S. Mo. 1929, because Mrs. Blake was a resident of Massachusetts, and Massachusetts was a state which, at the time of her death, did not impose an inheritance tax with respect to intangible personal property belonging to decedents who were residents of Missouri.

On July 29, 1940, the cause was submitted upon a stipulation of facts (R. 27).

On December 12, 1940, the Circuit Court entered its judgment or decree (R. 22), wherein it denied the relief prayed in plaintiffs' petition and rendered judgment in favor of the State of Missouri and against the trustees for inheritance taxes in the amount of $182,349.69. In such decree it held (a) that the reciprocity statute violated Article II, Section 30 (due process clause), and Article X, Section 3 (uniformity clause) of the Missouri Constitution; (b) that the reciprocity statute did not apply because the property in question had acquired a business situs in Missouri; and (c) that any exemption which was conferred by the statute was withdrawn by the repeal (subsequent to the death of Mrs. Blake) of the reciprocity statute.

From such decision the trustees appealed to the Supreme Court of Missouri (R. 25-26).

On July 21, 1941, the Supreme Court of Missouri, in Division No. 1 thereof, entered its judgment (R. 115), reversing and annulling the judgment of the Circuit Court and remanding the cause for further proceedings in conformity with its opinion (R. 116), wherein it held that none of the grounds upon which the Circuit Court's judgment was based were sustainable, and that the trustees were entitled to the benefits of the reciprocal exemption law.

On July 31, 1941, the State filed a motion for a rehearing (R. 126) and a motion to transfer to the Court en Banc (R. 132), in each of which the State claimed that a federal question was involved. The trustees filed separate suggestions in opposition to each of the motions (R. 133, 136), wherein they contended that such federal question was not involved in the case. On October 30, 1941, the Supreme Court of Missouri overruled both of the motions filed by the State (R. 139).

Further facts in relation to the effect of such proceedings in the Supreme Court of Missouri, subsequent to the rendition of its judgment, will be referred to under Point I of the argument herein, and, for sake of brevity, are omitted here.

ARGUMENT.

Summary of Argument.

1. No federal question is involved in this case because none was raised or decided in the state court. The decree of the Circuit Court was not based upon federal grounds. The State's brief in the Supreme Court of Missouri did not raise a federal question. The final ruling of the Supreme Court of Missouri was to the effect that none was involved.

2. Neither petitioner is a party entitled to contend that the Missouri reciprocity statute violated the Fourteenth Amendment. The petitioners have no individual rights protected by the Amendment. They may not act as champions of the rights of others.

3. Under the applicable decisions of this court, the reciprocal exemption law did not violate the Fourteenth Amendment, and no federal question of substance is, or may be, involved. The classification of the subjects of taxation made by the statute is supported by abundant reason resting upon comity between the states.

I.

No Federal Question Is Involved in this Case Because None Was Raised or Decided in the State Court.

The Attorney-General, one of the petitioners here, was not a party to the case below, and, of course, raised no federal question.

Although the State, in its answer filed in the Circuit Court (R. 17-18), alleged, among other defenses, that the reciprocity statute violated the Fourteenth Amendment to the Constitution of the United States, it did not press its

claim under the Federal Constitution, and the decree of the Circuit Court (R. 22-26) did not contain a conclusion that the reciprocity statute violated the Amendment nor a conclusion upon any other federal question.

Upon appeal by the trustees to the Supreme Court of Missouri, the State, as respondent there, did not assign error on the part of the trial court in not recognizing the federal claim, nor did it contend in the appellate court (prior to the decision therein) that the trial court's denial to the trustees of the benefits of the reciprocity statute was sustainable because that statute violated the Fourteenth Amendment.

The State's brief in the Supreme Court of Missouri, copies of which are herewith filed as an appendix, completely omitted any reference to the Federal Constitution and merely asserted with respect of the alleged invalidity of the reciprocity act that:

> "B. Section 576, supra, is a violation of the provisions of *our Constitution.*
>
> "1. Article 2, Section 30, is violated * * *.
>
> "2. Article 10, Section 3, is violated."

(See State's brief, pp. 6-7, cf. pp. 39-49.)

Such reliance by the State, in the Supreme Court of Missouri, upon provisions of the state constitution is not tantamount to invoking the equivalent clauses of the Federal Constitution and does not bring a federal question into issue. *Levy v. Superior Court of San Francisco*, 167 U. S. 175; *Kipley v. Illinois ex rel. Akin*, 170 U. S. 182, 187; *Gibbes v. Zimmerman*, 290 U. S. 326.

It thus appears that the State did not, in a timely manner, raise a federal question in the Supreme Court of Missouri, but elected to present its case in such manner as to

invoke a decision upon state grounds only, and so as to preclude, if it were to be successful, review by this court upon petition by the trustees.

The failure to raise the federal question in the Supreme Court of Missouri is decisive here. To sustain the jurisdiction of this court, this court must be able to see from the whole record "that a provision of the Constitution or act of Congress is relied upon" (*Dewey v. Des Moines*, 173 U. S. 193, 198; *Moore v. Mississippi*, 88 U. S. 636).

The petitioners attempt (Sup. Br. p. 10) to sustain their right to invoke the jurisdiction of this court by contending that the Supreme Court of Missouri in its opinion assumed that a federal question had been raised by the State. They thus attempt to correct their failure to raise the point by reliance upon consideration to which they were not upon the record entitled.

The Supreme Court of Missouri, however, by its subsequent action, removed the basis for a contention that a federal question was involved in its decision.

Upon the rendition of the opinion of the Supreme Court of Missouri (in Division No. 1 thereof), adverse to the contentions of the State, the State filed a motion for transfer of the cause to the court en banc, alleging that a federal question was involved (R. 132).[1]

The trustees filed suggestions in opposition to the motion for transfer (R. 133) on the ground that the federal question had been abandoned, and that, under the state practice, the court would not retain jurisdiction of a cause

[1] Such attempt to revivify a point that had been abandoned and not argued before Division No. 1 was ineffective, for, under the decisions of this court, the injection of a federal question is not timely when first appearing in the State Supreme Court upon motion for rehearing (*Herndon v. Georgia*, 295 U. S. 441; *Missouri ex rel. Missouri Insurance Company v. Gehner*, 281 U. S. 313, 320; *Citizens National Bank v. Durr*, 257 U. S. 99), or upon motion to transfer to the court en banc (*Bobb v. Jamison*, 155 U. S. 416; *Duncan v. Missouri*, 152 U. S. 377).

on the basis of a constitutional question after such question had been abandoned. *Village of Grandview v. McElroy*, 318 Mo. 135, 138; *Cooper County Bank v. Bank of Bunceton*, 310 Mo. 519; *Moore v. United Railways Co.*, 256 Mo. 165; *Botts v. Railroad*, 248 Mo. 56, 61.

The motion for transfer to the court en banc was in due course overruled (R. 139).

The overruling of this motion constituted an adjudication by the Supreme Court of Missouri that no federal question was involved. This is true because under the Missouri Constitution (Sec. 4 of the Amendment of 1890 to Art. VI)[2] a transfer to the court en banc is mandatory when a federal question is involved. Under the state practice, the action of the court in denying a motion for transfer to the court en banc, in a case where such transfer is claimed on the basis of involvement of a federal question, constitutes an adjudication that no federal question was involved in the decision of the court in Division. *State v. Duestrow*, 137 Mo. 44, 96.

This court refrains from assuming jurisdiction where the highest state court has declined to consider the federal question alleged to be involved because not properly raised. *Pennsylvania Railroad Company v. Illinois Brick Company*, 297 U. S. 447, 463.

The principles here invoked are but special applications of the general rule that where the constitutionality of a state statute has been upheld in the highest court of the

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2 The constitutional provision reads as follows:

"Sec. 4. Case transferred to court in banc, when.—When the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, or when a federal question is involved, the cause, on the application of the losing party, shall be transferred to the court for its decision; or when a division in which a cause is pending shall so order, the cause shall be transferred to the court for its decision."

state, this court refuses to consider grounds of attack not raised or decided in the state court.[3]

Having consciously elected to seek a decision in its favor upon exclusively state grounds, the State may not, upon adverse decision by the state court, seek review by this court.

II.

Neither Petitioner Is a Party Entitled to Contend That The Missouri Reciprocity Statute Violates the Fourteenth Amendment.

This is not a case in which a taxpayer resists the payment of a tax imposed by a state law on the ground that the law discriminates against him and therefore violates the Fourteenth Amendment.

On the contrary, this is a case in which a state statute declares that the tax "*shall not be payable*" and in which the State and its Attorney-General seek to impose a tax by invalidating such exemption statute.

The Missouri reciprocity statute, under which no tax is to be imposed under the circumstances of this case, was enacted by the legislature, approved by the Governor, and declared by the Supreme Court of Missouri in this case to be a valid exercise of the legislative power so far as the state constitution is concerned. Thus all three departments of the government of the State of Missouri have joined in formulating and sustaining the statute as part of the fiscal policy of the state and as expressing the will of the state.

Now the Attorney-General, purporting to act in the name of the State and also in his own official capacity,

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3 *McGoldrick v. Compagnie Generale Transatlantique*, 309 U. S. 430, 434; *New York ex rel. Cohn v. Graves*, 300 U. S. 308, 317; *Whitney v. California*, 274 U. S. 357, 362, 363; *Keokuk & H. Bridge Co. v. Illinois*, 175 U. S. 626, 633; *Dewey v. Des Moines*, 173 U. S. 193.

asserts that this statute is void because it deprives some one of due process or denies to some one equal protection of the laws in violation of the Fourteenth Amendment. He assumes, without express authority, the right to make such assertion in contradiction of the will of the state as expressed by law.

However, upon the record, neither petitioner is a party entitled to invoke the Fourteenth Amendment, because neither has individual rights which are thereby protected, and neither has capacity to act as the champion of the rights of others whose rights are thereby protected. In the absence of such a showing the constitutional question is moot, and this court would be without jurisdiction, for federal questions, upon which a party seeks review by this court, "must be real, the controversies they present must be substantial, not only from the nature of the principles invoked, but from the relation of the party to them by whom they are invoked" (*City of Lampasas v. Bell*, 180 U. S. 276, 284; see also *Massachusetts v. Mellon*, 262 U. S. 447).

A. *Neither the State of Missouri nor its Attorney-General Has Individual Rights Protected by the Fourteenth Amendment.*

The Fourteenth Amendment forbids a state to exercise its own power so as to deprive any person of due process or of equal protection of the laws. It was intended as a guarantee to secure the individual from the arbitrary exercise of the powers of government.

There is nothing in the Amendment which forbids the State of Missouri from depriving or denying itself. The Amendment leaves unincumbered the power of the state to dispose of its own as it pleases.

No suggestion is contained in the petition for writ or

supporting brief that any individual rights of the Attorney General are here at issue.

B. *Neither Petitioner Can Assert that the Reciprocity Statute Violates the Rights of Others and Act as Champion of those Rights.*

The petitioners, having no direct interest protected by the Fourteenth Amendment, so as to be entitled to invoke it on their own behalf, may not invoke it on behalf of others.

The principle on which rests the right of this court to declare a state statute void is that, in a real and actual controversy between parties before the court, the rights asserted depend upon the validity of a statute and the contention is made by a party thereby adversely affected that such statute infringes his constitutional rights.

The contention that a state statute violates the Fourteenth Amendment is available only to the injured party. Neither the state nor state officials under such rule have legal standing to attack the constitutionality of a state statute.

Thus it was said in *Columbus and Greenville Railway Company v. Miller*, 283 U. S. 96, 99:

> "While, so far as state practice is concerned, the authority of a public officer to assail in the courts of the state the constitutional validity of a state statute is a local question, this fact does not alter the fundamental principle, governing the determination of the Federal question by this court, that the protection of the 14th Amendment against state action is only for the benefit of those who are injured through the invasions of personal or property rights or through the discriminations which the Amendment forbids. The constitutional guaranty does not extend to the mere interest of an official, as such, who has not been de-

> prived of his property without due process of law or denied the equal protection of the laws."

And it was said in the concurring opinion in *Coleman v. Miller*, 307 U. S. 433, 466:

> "Again, this court has consistently held that the interest of a state official in vindicating the Constitution of the United States gives him no legal standing here to attack the constitutionality of a state statute in order to avoid compliance with it."

Similiter, Caffrey v. Oklahoma ex rel. Cunningham, 177 U. S. 346; *City of Lampasas v. Bell*, 180 U. S. 276; *Smith v. Indiana ex rel. Lewis*, 191 U. S. 138; *Braxton County Court v. West Virginia ex rel. Dillon*, 208 U. S. 192; *Stewart v. Kansas City*, 239 U. S. 14.

Nor may the constitutional rights claimed be asserted by the state on behalf of its own citizens. *Florida v. Mellon*, 273 U. S. 12.

Indeed, when Massachusetts, in relation to this very controversy, asserted in this court that Missouri was improperly withholding from a resident of Massachusetts the benefits of the Missouri reciprocity statute, this court, in *Massachusetts v. Missouri*, 308 U. S. 1, 17, refused to permit Massachusetts to champion the rights of its citizens, and relied upon *Oklahoma v. Atchison, Topeka and Santa Fe Railway Company*, 220 U. S. 277.

But even if the petitioners were permitted to act as champions for citizens of Missouri, or of some nonreciprocal state, their assertion on behalf of such citizens would necessarily be that the discrimination which renders the statute invalid is the imposition of a tax upon them, thus striking down the entire taxing law. Yet what the petitioners purport to seek here is the very reverse, namely, the imposition of a tax in the absence of a taxing statute.

Thus the fallacy of petitioners' position is clear. They assert a discrimination against persons not involved in this litigation, which, if established, would defeat the tax as to such persons, and yet contend that the result must be the imposition of a tax upon the respondents who were expressly exempted from tax.

We submit that such a position on the part of petitioners, even if they had the capacity to maintain it, could raise no real federal question, i. e., one under which the result would be to change the decision of the Supreme Court of Missouri, that there is no lien upon the property in question for Missouri inheritance taxes.

III.

Under the Applicable Decisions of this Court, the Reciprocal Exemption Law Did Not Violate the Fourteenth Amendment and No Federal Question of Substance Is or May Be Involved.

Unless the petitioners are able to demonstrate that the classification of subjects of taxation made by the reciprocity statute is purely arbitrary and may be supported by no rational basis, the federal question here involved, under the Fourteenth Amendment, is without substance.

The test of constitutionality to be employed is clear, for this court has consistently held that the selection by a state legislature of a particular class of subjects for taxation or exemption does not violate the Fourteenth Amendment, if there is any reasonable ground for the classification, or if there is any rational basis for the distinction on which it is based. The cases upon this proposition are numerous, and only a few of the more recent of them will be here referred to: *Carmichael v. Southern Coal and Coke Company*, 301 U. S. 495, 509; *Whitney v. State Tax Commission of New York*, 309 U. S. 530, 542; *Madden v. Ken-*

tucky, 309 U. S. 83, 88; *Caskey Baking Company, Inc., v. Virginia*, 313 U. S. 117.

The State, in invoking the Fourteenth Amendment as invalidating its reciprocity statute, must assume the burden of negativing every conceivable basis which might support it. *Madden v. Kentucky*, supra.

This burden it does not sustain by demonstrating merely that the reciprocity statute results in a *difference* in treatment as between beneficiaries who take from a decedent who resided in a reciprocating state and beneficiaries who take from one who resided in a state which did not reciprocate. Classification presupposes that there are *differences*.

Nor is it material, under the Fourteenth Amendment, that the classification here involved is one based upon the law of the state of the residence of the decedent, while other classifications of the inheritance tax law are based upon the relationships of the beneficiaries. In *Carmichael v. Southern Coal and Coke Company*, 301 U. S. 495, 509, this court, referring to exemptions from the operation of a tax imposed upon members of a class, said:

> "A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it. * * *"

Nor is there anything constitutionally objectionable in letting the tax or want of tax rest upon the tax policy of another jurisdiction. The 80 per cent credit under the federal Estate Tax Law so rests and is valid. *Florida v. Mellon*, 273 U. S. 12. Upon the same basis rest retaliatory foreign insurance company laws, which have been sus-

tained by this court (*Fire Association of Philadelphia v. New York*, 119 U. S. 110) and numerous state courts[4] against the objection that they were discriminatory as well as against other constitutional objections.

The reciprocity statute is grounded upon reason and designed to promote uniformity and equality, as is clearly shown by the history and purposes of the statute.

Blackstone v. Miller, 188 U. S. 189—wherein it was held that two or more states might, without infringing constitutional limitations, impose a tax upon the death of a decedent in respect of the same property—was only shortly decided when there came from Mr. Justices Holmes, in *Kidd v. Alabama*, 188 U. S. 730, 732, the suggestion:

> "No doubt it would be a great advantage to the country and to the individual states if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far."

Under the impetus of *Blackstone v. Miller*, thirty-five states had, prior to 1930, enacted statutes which either exempted intangibles of nonresidents entirely, or which granted reciprocal exemptions (*Farmers Loan and Trust Company v. Minnesota*, 280 U. S. 204).

Unquestionably, one of the reasons for the adoption of the policy of complete or reciprocal exemption was to stimulate the business of local financial institutions. Under a system of multiple taxation, capital would be restrained from venturing away from the state of the domicile of the owner by the prospect of multiple taxation

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[4] *Pacific Mutual Life Insurance Co. v. Lowe*, 354 Ill. 398; *Home Insurance Co. v. Swigert*, 104 Ill. 653; *State ex rel. Baldwin v. Insurance Co.*, 115 Ind. 257; *Employers Casualty Company v. Hobbs*, 107 Pac. (2d) 715, 716; *Clay v. Dixie Fire Insurance Co.*, 168 Ky. 315; *State v. Insurance Co.*, 71 Neb. 320. See, also, note in 91 A. L. R. 795, 798.

upon the same property, if it remained beyond the boundaries of that state when the owner died.

The result of the widespread action of the states was to produce a common scheme whereby each state, as between reciprocity states, reserved the exclusive right to tax the intangibles of residents and relinquished the right to tax the intangibles of nonresidents. Thus, uniformity and equality of taxation were approached, and the discrimination between property which was sent into other states and taxed twice, and property that was kept at home and taxed once, was eliminated.

These considerations were before the Missouri Legislature when in 1929 it enacted the reciprocity statute here involved.

During the period following *Blackstone v. Miller*, questions of construction of the reciprocity statutes have been before the courts of last resort in a number of states, and their validity has been uniformly assumed.[5]

In view of the coherent system of uniform taxation in which the reciprocity statute was designed to play its part, it cannot seriously be contended that there was no reason whatsoever for the enactment of that statute or that it was the result of whim or caprice. The fact that similar statutes were enacted in so many states plainly shows that there was an almost universally recognized rational basis for the legislation. Such wide acceptance of the tax policy shows clearly that there is no substantial question involved in this case.

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5 *Fisher v. Brucker*, 41 F. (2d) 774; *State of Kansas ex rel. John S. Dawson v. Frank K. Davis et al., Administrators*, 88 Kan. 849; *Bliss v. Bliss*, 221 Mass. 201; *State of Minnesota ex rel. Graff v. Probate Court of the County of St. Louis*, 128 Minn. 371; *City Bank Farmers Trust Company v. New York Central Railroad Company*, 253 N. Y. 49; *Commonwealth v. Farmers Loan and Trust Company*, 301 Pa. 114; *In the Matter of the Estate of Elizabeth Eilermann, Deceased*, 179 Wash. 15. See, also, note in 69 A. L. R. 949.

The contention of petitioners contemplates an unthinkable destruction of taxing schemes developed upon principles of comity by the co-ordinated effort of the majority of the states of the union. Were the contention one of substance, its implications might indeed be broad.

But it lacks substance because it confronts the reasoned consideration of legislatures throughout the country.

Conclusion.

We submit that the writ should be denied for the following reasons:

(1) No federal question was raised before the Supreme Court of Missouri or was decided by that Court. The denial of the motion to transfer to the court en banc is conclusive.

(2) Neither petitioner has any right to raise a federal question for itself or himself, or on behalf of another, nor is a federal question so raised or involved as to afford a basis for review by this Court.

(3) The subject matter of this litigation does not raise any real or substantial federal question, but only questions long and uniformly decided against the contentions of the petitioners.

Respectfully submitted,

DANIEL N. KIRBY,
ALLEN C. ORRICK,
HARRY W. KROEGER,
Of St. Louis, Missouri,
Counsel for Respondents.

CHARLES M. ROGERSON,
Of Boston, Massachusetts,
Of Counsel.

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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 797.

STATE OF MISSOURI and ROY McKITTRICK, as Attorney General of Missouri, Petitioners,

vs.

ST. LOUIS UNION TRUST COMPANY, Trustee Under Indenture of Trust Made February 14, 1921, by Madge Barney Blake,

ST. LOUIS UNION TRUST COMPANY, Trustee Under Indenture of Trust Made January 11, 1929, by Madge Barney Blake,

ST. LOUIS UNION TRUST COMPANY, CHARLES B. MALOY and CLARENCE E. MALOY, Trustees Under Indenture of Trust Made May 20, 1935, by Madge Barney Blake, Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Missouri.

APPENDIX

To Brief for the Respondents in Opposition.

COPY OF BRIEF FILED BY THE STATE IN THE SUPREME COURT OF MISSOURI.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

IN THE

Supreme Court of Missouri

DIVISION NO. 1.

MAY TERM, 1941.

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ST. LOUIS UNION TRUST COMPANY, CHARLES B. MALOY AND CLARENCE E. MALOY, Trustees Under Indenture of Trust Made May 20, 1935, By Madge Barney Blake, *Plaintiffs-Appellants*,
v.
THE STATE OF MISSOURI, *Defendant-Respondent.*

No. 37563.

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MO., DIVISION NO. 3.

Hon. Eugene F. Padberg, Judge.

BRIEF FOR RESPONDENT.

ROY McKITTRICK,
Attorney General,

RUSSELL C. STONE,
Assistant Attorney General,

WILLIAM C. CONNETT, IV,
Assistant Attorney General,
Attorneys for Respondent.

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No. 37563.

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MO., DIVISION NO. 3.
Hon. Eugene F. Padberg, Judge.

BRIEF FOR RESPONDENT.

STATEMENT.

This is a special statutory action against the State of Missouri by Appellants, under the provisions of Section 598 of R. S. Mo., 1939, for the purpose of removing a lien or claim of lien for inheritance taxes against certain trust estates, created by one, Madge Barney Blake during her lifetime. The Circuit Court of the City of St. Louis found that all trust estates, created by the decedent, were subject to the payment of an inheritance tax in the sum of $182,349.69. It is from this judgment Appellants prosecute this appeal.

THE FACTS.

Respondent adopts the abridgment of facts as narrated by Appellants in their brief, but feels that such abridgment does not give the court a clear understanding of the Trusts involved herein. In this respect, we feel free to enlarge upon the same.

The evidence shows that on February 14, 1921, Madge Barney Blake executed and delivered a certain trust instrument (Abs. p. 43) to the St. Louis Union Trust Company as Trustee, reserving to herself the income for life, together with a power of revocation or modification of said instrument, which instrument was modified under date of March 31, 1933 (Abs. p. 59) and June 2, 1934 (Abs. p. 61). Under the amendment of the latter date, the decedent relinquished her right of control over any investments which were made or were to be made by the trustees (Abs. p. 61).

On January 11, 1929, the decedent executed and delivered a certain trust indenture (Abs. p. 63) to the St. Louis Union Trust Company as Trustee, reserving to herself the net income for life, together with a power of modification as to said trust indenture (Abs. p. 64).

On May 20, 1935, decedent executed another trust indenture and delivered same to the St. Louis Union Trust Company as Trustee, whereby she retained the net income arising therefrom for her life, together with a power of revocation and modification (Abs. p. 66).

All of the trust assets of the trusts hereinabove referred to have been located within the State of Missouri since March 20, 1917. The trusts of 1929 and 1935 represent accumulation of income of the trust dated February 14, 1921. The assets composing the trust created under date of February 14, 1921, were formerly assets of a trust created by decedent under date of March 20, 1917. From the date of the creation of the first trust in 1917, an unexpended income therefrom was accumulated by the trustee as agent for the deceased, and when these accumulations had reached sufficient size, the deceased created another trust (Abs. p. 29).

The facts further show that the Boston Safe Deposit and Trust Company of Boston, Massachusetts, the executor under the will of the deceased, filed with the Collector of Internal Revenue of the United States at Boston, Massachusetts an Estate Tax Return, which return discloses that the three trust estates above described were included in computing the tax therein (Abs. p. 81).

POINTS AND AUTHORITIES.

I.

THE TRUST ESTATES CREATED BY MADGE BARNEY BLAKE, CONSISTING OF INTANGIBLE PERSONAL PROPERTY IN THE FORM OF STOCKS, BONDS, NOTES ET CETERA ARE EXIGIBLE UNDER THE PROVISIONS OF THE INHERITANCE TAX ACT.

A. *Nature of Tax.*

Brown v. State, 19 S. W. (2) 12, 16; 323 Mo. 138;
Bryant v. Greene, 44 S. W. (2) 7, 8; 328 Mo. 1226;
In Re Rosing's Estate, 85 S. W. (2) 495; 337 Mo. 544.

B. *Scope of Tax.*

Section 571 of R. S. Mo., 1939.

C. *Application of Statute to Facts.*

Curry v. McCanless, 307 U. S. 357; 83 L. ed. 1339;
Graves v. Elliott, 83 L. ed. 1356; 307 U. S. 383;
State v. Baldwin's Estate, 19 S. W. (2) 732; 323 Mo. 207;
Baldwin v. Missouri, 74 L. ed. 1056; 281 U. S. 586.

II.

THE FULL AMOUNT OF TAX AGREED UPON IS DUE AND PAYABLE.

Section 598, R. S. Mo., 1939;
Section 1684, R. S. Mo., 1939;
Rains v. Moulder, 90 S. W. (2) 81; 338 Mo. 275.

A. *The assets of the Trust Estate created by the Decedent, Madge Barney Blake under date of January 11, 1929 are subject to the payment of a tax, under the provisions of the Inheritance Tax Act as it existed prior to 1929, and before the Amendment of 1931.*

Section 570, R. S. Mo., 1929;
Laws of Mo., 1931, page 130;
People v. Moir, 207 Ill. 180;
In Re Brockett's Estate, 111 N. J. Eq. 183; 162 Atl. 150;
Re Brix, 181 Cal. 667, 186 Pac. 135;
Harbor v. Whelchel, 156 Ga. 601; 119 S. E. 695;
People v. Tavener, 300 Ill. 373; 133 N. E. 211;
People v. Moses, 363 Ill. 423;
Re Rotter, 188 Cal. 55; 204 Pac. 826;
Brown v. Gulliford, 181 Iowa 897; 165 N. W. 182;
Re Oppenheimer, 75 Montana 186; 243 Pac. 589;
Re Brandreth, 169 N. Y. 437; 62 N. E. 563;
Scherman v. Tax Commission, 125 Ohio State 367;
Estate of Henry Leffmann, 167 Atl. 343;
Commissioner v. Northern Trust Co., 283 U. S. 782; 75 Law Ed. 1412;
May v. Heiner, 281 U. S. 238; 74 Law Ed. 826.

(1) *The amendment of 1931 is a legislative interpretation of Section 570, supra.*

Morgan v. Jewell Const. Co., 91 S. W. (2d) 638; 230 Mo. App. 425.

B. *Taxes paid to Massachusetts should not be deducted from the gross estate in arriving at its clear market value.*

People v. Palmer, 25 Col. App. 150; 139 Pac. 554;
People v. Ballans, 294 Ill. 551; 128 N. E. 542.

III.

THE TRUST ESTATES ARE NOT EXEMPT UNDER THE PROVISIONS OF SECTION 576 OF R. S. MO., 1929.

A. *The state, having afforded a remedy to any interested person within the purview of Section 598, is entitled to assert any defense that may be asserted by those persons who would be aggrieved by reason of the claim of lien for inheritance taxes.*

Section 598 of R. S. Mo., 1939;
59 C. J., p. 304, Par. 461;
59 C. J., p. 319, Par. 475;
12 C. J., p. 760, Par. 177;
State ex rel. Brewster, Attorney General v. Doane, 158 P. 38, 40; 98 Kan. 435;
State ex rel. Equality Sav. & Bldg. Ass'n v. Brown, 68 S. W. (2d) 55; 334 Mo. 781;
Pacific Indemnity Company vs. Myers, 211 Cal. 635; 296 Pac. 1084;
Miller, City Tax Collector vs. Lamar Life Insurance Co., 158 Miss. 788; 131 So. 282.

B. *Section 576, supra, is a violation of the provisions of our Constitution.*

(1) *Article 2, Section 30 is violated.*

Article 2, Section 30, Constitution of the State of Missouri;
Section 576, R. S. Mo., 1929;
State ex rel. Wyatt vs. Ashbrook, 154 Mo. 375; 55 S. W. 627;
White vs. Missouri, Kansas & Texas Railway, 230 Mo. 287; 130 S. W. 325;
Boonville National Bank vs. Scholtzhauer, 317 Mo. 1298; 298 S. W. 732;
State ex rel. Fath et al. vs. Henderson, 160 Mo. 190; 60 S. W. 1093;
State ex rel. McClintock et al. vs. Guinotte, 275 Mo. 298; 204 S. W. 806.

(2) *Article 10, Section 3 is violated.*

Article 10, Section 3 of the Constitution of the State of Missouri;
Section 576, R. S. Mo., 1929;
State ex rel. McClintock et al. vs. Guinotte, 275 Mo. 298; 204 S. W. 806;
Brown vs. State, 323 Mo. 138; 19 S. W. (2) 12;
Bryant vs. Greene, 328 Mo. 1226; 44 S. W. (2) 7;
In re Rosing's Estate, 337 Mo. 544; 85 S. W. (2) 495;
In re Bernay's Estate, 344 Mo. 135; 126 S. W. (2) 209;
State ex rel. Thompkins vs. Shipman, 290 Mo. 65; 234 S. W. 60;
Ex Parte Asotsky, 319 Mo. 810; 5 S. W. (2) 22;
State vs. Freehold Investment Co., 305 Mo. 88; 264 S. W. 702;
State ex rel. Wyatt vs. Ashbrook, 154 Mo. 375; 55 S. W. 627;
Kansas City vs. Whipple, 136 Mo. 475; 38 S. W. 295.

C. *The withdrawal of the exemption provided by Section 576, R. S. Mo., 1929, by the legislature in 1939 now requires the payment of a tax under circumstances here involved.*

61 C. J., p. 407, Par. 421;
Blodgett v. Bridgeport City Trust Co., 161 Atl. 83; 115 Conn. 127;
In re Estate of Costello v. King, 338 Mo. 673; 92 S. W. (2d) 723;
Haizlip vs. Haizlip, 240 Mo. 392; 144 S. W. 851.

D. *The trust estates involved herein having acquired a business situs, Section 576, R. S. Mo., 1929, has no application.*

Section 576, R. S. Mo., 1929;
First National Bank of Boston vs. Maine (1932), 284 U. S. 312;

Baldwin vs. Missouri, 281 U. S. 586, 74 L. Ed. 1056;

Farmers Loan & Trust Co. v. Minnesota (1930), 280 U. S. 204;

Curry vs. McCanless, 307 U. S. 357, 83 L. Ed. 1339;

Graves vs. Elliott, 307 U. S. 383, 83 L. Ed. 1356;

New Orleans vs. Stemple, 175 U. S. 309;

First Bank Stock Corp. vs. Minnesota, 301 U. S. 234;

Bullen vs. Wisconsin, 240 U. S. 625;

Baldwin's Estate vs. Missouri, 323 Mo. 207; 19 S. W. (2) 732;

D. G. Taylor, Administrator of A. H. Lee, Deceased vs. St. Louis County Court, 47 Mo. 594.

ARGUMENT.

I.

THE TRUST ESTATES CREATED BY MADGE BARNEY BLAKE, CONSISTING OF INTANGIBLE PERSONAL PROPERTY IN THE FORM OF STOCKS, BONDS, NOTES ET CETERA ARE EXIGIBLE UNDER THE PROVISIONS OF THE INHERITANCE TAX ACT.

In the development of Respondent's argument, in support of its theory that the trust estates herein involved are subject to the payment of an inheritance tax, it is not amiss to observe that appellants have devoted the first twenty-three pages of their argument to a discussion of a provision of our statute, which is now repealed, and which they have designated as being a Reciprocity Statute, before precisely stating the question involved in the following language:

> "The question here presented is not whether Missouri *could* tax, but whether she did tax. (Brief of App. p. 12.)

Hence, it is to be seen from this observation that the real question involved, and the one before the court for determination, is whether or not the State of Missouri has imposed an Inheritance Tax on the Trust Estates. A solution of this question necessarily requires a brief review of the cases construing the provisions of our act.

A. *Nature of Tax.*

The nature of an Inheritance Tax has been ably defined in the language of this court in the Case of Brown v. State, 19 S. W. (2d) 12, 16; 323 Mo. 138 as follows:

> " 'An inheritance tax, using the term in its broadest sense, is an excise, which may be imposed on either, or both, of two entirely different subjects. It may be a tax upon the transmission of property by a deceased person, in which case it will be charged upon the whole estate, regardless of the manner in which it is to be distributed. Such a tax is called a probate duty, or estate tax. **An inheritance tax in its common form is however an excise on the privilege of taking property by will or by inheritance or by succession in any other form upon the death of the owner, and in such case is imposed upon each legacy or distributive share of the estate as it is received.* * * *' "

To the same effect is the holding of this court in the Case of Bryant v. Greene, 44 S. W. (2d) 7, 8; 328 Mo. 1226, in which this court said:

> "Under the state statute, the tax is levied on the right to receive property upon death. * *"

This court, in the Case of In Re Rosing's Estate, 85 S. W. (2d) 495, 500; 337 Mo. 544, said:

> "* * * there is no doubt but what our inheritance tax is a tax upon the right of heir or legatee to receive the property."

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*ALL EMPHASIS, UNLESS OTHERWISE NOTED, IS ATTRIBUTABLE TO COUNSEL

Following the Rosing's Case, this court decided in the Case In Re Bernays' Estate, 126 S. W. (2d) 209; 344 Mo. 135 again, that our inheritance tax was levied upon the right to receive property, although it was apparent from the Rosing's Case that all doubt had been removed as to its nature.

B. *Scope of Tax.*

Section 571 of R. S. Mo., 1939, provides as follows:

> "A tax shall be and is hereby imposed upon the transfer of any property, real, personal or mixed, or any interest therein or income therefrom, in trust or otherwise, to persons, institutions, associations, or corporation, not hereinafter exempted, in the following cases: When the transfer is by will or by the intestate laws of this state from any person dying possessed of the property while a resident of this state. When the transfer is by will, or intestate law of property within the state or within the jurisdiction of the state and decedent was a non-resident of the state at the time of his death. When the transfer is made by a resident or by a non-resident when such non-resident's property is within this state or within its jurisdiction by deed, grant, bargain, sale or gift made in contemplation of the death of grantor, vendor or donor, or intending to take effect in possession or enjoyment at or after such death. Every transfer by deed, grant, bargain, sale or gift made within two years prior to the death of grantor, vendor or donor, of a material part of his estate or in the nature of a final disposition or distribution thereof without an adequate valuable consideration shall be construed to have been made in contemplation of death within the meaning of this section. When the transfer is made by a resident or by a non-resident when such non-resident's property is within this state or within its jurisdiction, in trust or otherwise

and the transferor has retained for his life or any period not ending before his death, (1) the possession or enjoyment of or the income from the property, or (2) the right to designate the persons who shall possess or enjoy the property or income therefrom, except in case of a *bona fide* sale for an adequate and full consideration in money or money's worth. Such tax shall be imposed when any person, association, institution or corporation actually comes into the possession and enjoyment of the property, interest therein or income therefrom, whether the transfer thereof is made before or after the passage of this law: *Provided*, that property which is actually vested in such persons or corporations before this law takes effect shall not be subject to the tax."

Under the provisions of the above statute, it is apparent that before a non-resident is subjected to the provisions of this statute, the following requirements are necessary: (1) such non-resident must die; (2) such non-resident must leave property in this state or within its jurisdiction; (3) when the property of a non-resident is transferred before death, then such property must be transferred as follows: (a) to take effect in possession or enjoyment to transferee at or after such death, or (b) the transferor must have retained the income from such transferred property for life or a period not ending before his death, or (c) the transferor must have retained the right to designate the person or persons who shall enjoy the property or income therefrom. Thus it follows, that before an inheritance tax can be asserted to be due and payable, requirements designated (1) and (2) must occur.

And when a transfer is made by a non-resident, decedent prior to his death, then one or more of the contingencies designated (a), (b) or (c) must likewise happen.

C. *Application of Statute to Facts.*

In demonstrating the taxability of the trust estates, herein involved, it is necessary that we consider the evidence adduced. Madge Barney Blake did die (Abs. p. 28); that decedent left intangible personal property in this state of the value of $1,850,789.77 in the hands of appellants under the provisions of certain trust indentures, hereinafter referred to; that decedent received the income from the intangible personal property from the trust estates and reserved the right to designate the person or persons who should possess the property or income therefrom after decedent's death (Abs. pp. 29, 30, 31 and 32); that decedent also retained the power to modify and revoke the three trust indentures.

Trust of February 14, 1921.

On February 14, 1921, the decedent revoked a trust indenture previously entered into with the St. Louis Union Trust Co., the Appellant herein, and reconveyed the assets of the trust which had been revoked back to the St. Louis Union Trust Co. The trust indenture, among other things, provided that:

"Said trustee, after paying all necessary and usual expenses of preserving and managing said trust estate and those incident to the execution of the trusts hereby created, shall pay over to me the remainder of the income." (Abs. p. 45.)

It was further provided that:

"This trust is herein declared and the trust estate is herein created and the interests hereunder are vested subject to the express condition and reservation of power in me, said Madge Barney Blake, to revoke this Indenture of Trust in whole or in part, and to free the property constituting said trust estate, or any portion thereof, from the trusts herein declared, * * * *" (Abs. p. 56).

Trust of January 11, 1929.

Just as in the trust above noticed, it was provided by this trust, among other things, that said trustee:

"shall pay over the net income accruing therefrom to me, so long as I shall live, and after my death to my husband." (Abs. p. 64.)

It was further provided that:

"At the death of my said husband, or at my death if I shall survive him the trustee shall dispose of such property as shall then remain in its hands and form the trust estate hereunder, in the same manner and in the same proportions and to the same beneficiaries as is provided for the distribution of the residue of the trust fund created by me in an instrument of trust dated February 14th, 1921, in which I was donor and the St. Louis Union Trust Company was named as trustee." (Abs. p. 64.)

Trust of May 20, 1935.

Under this trust indenture, it was provided, among other things, that:

> "After the payment of all reasonable costs and expenses incurred in the administration of the trust estate, the net income shall be devoted to the following uses and purposes: As long as the Donor continues to live, she shall be entitled to receive all of said net income." (Abs. p. 66.)

It was further provided that:

> "The Donor hereby reserves the right to alter, modify or amend this Indenture upon her written notice to the Trustee, and upon the receipt by said Trustee of such notice, together with a copy of the alteration, modification or amendment of this Indenture, the same shall thereupon be and become a part of this Indenture, and the trust estate shall be administered and distributed under the terms and provisions of this Indenture as thus altered, modified or amended" (Abs. p. 70).

> "The Donor hereby reserves the right to revoke and vacate this trust in whole or in part, or to withdraw any of the said funds, securities or property from its operation at any time during her life, upon her written notice to the Trustee, and upon the receipt of any such notice by the Trustee, revoking or vacating this trust or requesting the withdrawal of any of the said funds, securities or property, this trust as to such funds, securities or property shall stand revoked and vacated, and the same shall be delivered unto the Donor free from trust" (Abs. p. 70).

We submit, from these considerations that the trust estates are clearly within the purview of Section 571, supra. In support of this view, atten-

tion is directed to the Case of Curry v. McCanless, 307 U. S. 357; 83 L. ed. 1339. This case is cited because of the fact it demonstrates the right of any state to impose an inheritance tax on the property of a non-resident, and rejects the previous doctrine, of mobilia sequuntur personam. In that case, the question, before the court for decision, was whether or not the states of Alabama and Tennessee might constitutionally, impose death taxes upon the transfer of an interest in intangibles, which were held in trust by an Alabama Trustee, but passing under the will of a beneficiary decedent domiciled in Tennessee. The facts in that case revealed that the decedent was domiciled in Tennessee, and under the terms of a certain trust indenture transferred certain stocks and bonds and other intangible property to the Title Guarantee Loan and Trust Company, an Alabama Corporation doing business in that state. In this respect, it might be pointed out that the facts in that case are practically identical with the facts in the instant case. Like the instant case, there it was also provided, under the terms of the trust identure, that the net income from the trust property should be paid over to the decedent during her lifetime. The decedent in that case also reserved the power to remove the trustee and substitute another, which was never done, and the power to direct the sale of the property and the investment of the proceeds. Here again, the facts are almost identical with the facts in the instant case. Until decedent's death in that case,

the trust was administered by the Trust Company afore-mentioned in Alabama, and the paper evidences of the intangibles held by the trustees were at all times located in Alabama. This is likewise true in the present case.

In holding the trust estates there subject to a tax, Mr. Justice Stone recognized the basis for the taxation of intangibles, in the following language:

> "If taxation is but a means of distributing the cost of government among those who are subjected to its control and who enjoy the protection of its laws * * * * * legal ownership of the intangibles in Alabama by the Alabama Trustee would seem to afford adequate basis for imposing on him a tax measured by their value."

In the instant case, the decedent created two sets of legal relationships, one embodied in the legal ownership and management by the St. Louis Union Trust Company of the intangibles comprising the trust, and the other from the equitable right of the decedent to control the action of the trustees, and to compel said trustee to pay over to her during her lifetime the income resulting from such trusts, and the principal should she so demand.

Attention is also directed to the Case of Graves v. Elliott, 83 L. ed. 1356, 307 U. S. 383. In that case, the facts are practically identical with the facts as are present in the instant case, in that the decedent there had the right to revoke the trusts and reinvest herself with the title of the property conveyed under the trust instruments. The court observed that the essential elements, of the ques-

tion presented in that case, were identical with those considered in the Case of Curry v. McCanless, before noticed. In that case, Mr. Justice Stone tersely observed that:

> "* * * a power to revoke a trust created by a decedent is likewise an appropriate subject of taxation. * * * *"

In support of his view that the power to revoke a trust was a subject of taxation, it was further observed that:

> "* * * * Her right to revoke the trust and to demand the transmission to her of the intangibles by the trustee and the delivery to her of their physical evidences was a potential source of wealth, having the attributes of property. * * * *"

Attention is also directed to the Case of State v. Baldwin's Estate, 19 S. W. (2d) 732, 323 Mo. 207. In that case, the question, before the court for determination, was whether or not the property, of the decedent consisting of sums of money on deposits, promissory notes, liberty bonds and other evidences of indebtedness, was subject to the payment of an inheritance tax. In ruling the question, this court said at page 735:

> "* * * * All of it was properly within the jurisdiction of a probate court in this state, and therefore 'within the jurisdiction of the state' in the terms of the statute. Such evidences of debt could not remain in this state without being in the custody of some person or corporation, who had authority over it as an agent of the owner; otherwise it would not have been here so as to be accessible to the administrator. It

> possibly acquired a business situs in this state. Whether it did or not, it was within the jurisdiction of the state, and property subject to the transfer tax. It would have been a proper subject of inquiry by the trial court to determine how and why and under what conditions these evidences of debt were in this state, but, whatever the determination of that question, the property was legally within the jurisdiction of the probate court of Lewis county in this state, and subject to the tax."

That case was subsequently appealed to the Supreme Court of the United States, and was thereafter styled Baldwin v. Missouri, 74 L. ed. 1056, 281 U. S. 586. The Supreme Court of the United States reversed this court's decision because of the fact the inheritance tax statute, in their opinion, violated the 14th Amendment to the Constitution of the United States, in that intangible property could only be taxed at the domicile of the owner of such property. While the court so ruled, it was tersely pointed out by Mr. Justice McReynolds, who wrote the opinion:

> "* * * * The record discloses nothing tending to show that personal property had been given a business situs in that state."

In other words, the effect of the decision of the Supreme Court in that case was to permit the taxation of intangibles, which had acquired a business situs in a state, other than the domicile of the owner of such intangibles. Hence, even under the rule announced in Baldwin v. Missouri, it may be deduced from the Court's decision that the doctrine of

mobilia sequuntur personam did not apply in the case of intangibles, which had acquired a business situs. This doctrine was extended and emphasized in Curry v. McCanless by Mr. Justice Stone in the following language:

> "* * * * But when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains, * * * *"

From these considerations, it is at once apparent that the decision of this court in State v. Baldwin is now squarely in point in support of the state's right to tax the trust estates involved, because of the recent decision of Curry v. McCanless, supra. Our view in this respect is supported by the fact that Mr. Justice Stone, who wrote one of the dissenting opinions in the Case of Baldwin v. Missouri also wrote the principal opinion in Curry v. McCanless, supra. In the dissenting opinion of the Baldwin Case, Mr. Justice Stone observed that taxation becomes increasingly difficult:

> "* * * * if the securities of a nonresident may not be taxed where located, and where alone they may be reached, but where the courts are not open to the tax gatherers of the domicil. (Cases cited.)
>
> "It is said that the present record discloses nothing tending to show that the decedent's personal property had been given a business situs in Missouri. The Supreme Court of Missouri said: 'It is a reasonable inference that the cash and notes in such large quantities in Missouri,

when none of it was held in Illinois, was retained in this state for the purpose of investment. They may have established a business situs in this state.'"

In the Curry Case a dissenting opinion was written by Mr. Chief Justice Hughes, and concurred in by Mr. Justice McReynolds. The views announced by Mr. Chief Justice Hughes are the same views embodied in the Case of Baldwin v. Missouri. Therefore, it follows that what this court said, at the time the Case of State v. Baldwin was decided, is today the accepted view of the Supreme Court of the United States, and is authority in support of the proposition that the trust estates are exigible.

II.

THE FULL AMOUNT OF TAX AGREED UPON IS DUE AND PAYABLE.

It has been urged by the appellants under Point 5, page 55 of their brief that the Circuit Court of the City of St. Louis did not have sufficient authority to enter a judgment in behalf of the respondents for the amount of the tax. This contention is raised in spite of the fact that the parties hereto by their stipulation set forth the amount of tax that was due should the Court determine that the trust estates herein involved are exigible. In answer to this contention respondents desire to point out that Section 598, R. S. Mo. 1939 provides:

"* * * * The procedure and practice in all actions brought under this section, except as otherwise provided in this article, shall be

> governed by the provisions of the code of civil procedure in relation to civil actions, so far as the same shall or may be applicable, including all provisions relating to motions for new trials and appeals. The remedies provided in this section shall be in addition to and not exclusive of any remedies provided in the sections preceding this section."

Inasmuch as the foregoing section as a whole contemplates a suit to quiet title or a claim or lien on the part of the State of Missouri, it is logical to turn to the section of civil procedure that deals with quieting titles and inspect such section to see what are the statutory rights of the parties. Section 1684, R. S. Mo. 1939 provides as follows:

> "* * * And upon the trial of such cause, if same be asked for in the pleadings of either party, the court may hear and finally determine any and all rights, claims, interest, liens and demands, whatsoever of the parties, or of any one of them, concerning or affecting said real property, and may award full and complete relief, whether legal or equitable, to the several parties, and to each of them, as fully and with the same force and effect as the court might or could in any other or different action brought by the parties, or any one of them, to enforce any such right, claim, interest, lien or demand, and the judgment or decree of the court when so rendered shall be as effectual between the parties thereto as if rendered in any other, different or separate action prosecuted therefore."

This section of the statute needless to say, has been interpreted by our courts on many occasions and they all seem to hold uniformly that once the Court is given jurisdiction to quiet title that it

has full authority to settle all controversies arising out of any lien, claim of lien that any party might assert. Further it matters not whether these rights are legal or equitable. Rains vs. Moulder, 90 S. W. (2) 81, 338 Mo. 275.

It is therefore, respectfully submitted that the State of Missouri in asserting their claims of lien for inheritance taxes against the property of the deceased has the further right to have the amount of said taxes adjudicated in the same proceedings rather than have to institute a new action for the subsequent determination of the tax.

A. *The Assets of the Trust Estate created by the Decedent, Madge Barney Blake under date of January 11, 1929, are subject to the payment of a tax, under the provisions of the Inheritance Tax Act as it existed prior to 1929, and before the Amendment of 1931.*

The court will recall at the outset of our argument (Point I, Subdiv. A, page 10) we conclusively demonstrated that an inheritance tax is an excise, based upon the right to receive property. It is with this thought in mind we approach the argument of appellants, that the assets of January 11, 1929, should in no event be included in the gross estate, subject to a tax because such trust was irrevocable, and no statute of Missouri imposed a tax in respect of property irrevocably transferred prior to 1931 merely because the transfer was subject to a reservation of a life interest. In support of this argument, appellants rely upon the In Re Rosing's Case, supra.

That the trust of 1929 was irrevocable, we admit. On the other hand, that the statute (Section 570 of R. S. Mo., 1929) did not provide for the imposition of a tax we strenuously assert is not substantiated by an analysis of such statute as it existed prior to its amendment in 1931. (Laws of Mo., 1931, page 130). Appellants do not give the court the benefit of that statute as it existed prior to its amendment in 1929. They cite their interpretation of the statute, together with the Amendment of 1931 (Brief of Appellants, page 58). The statute prior to its amendment of 1929, read as follows:

> "A tax shall be and is hereby imposed upon the transfer of any property, real, personal or mixed or any interest therein or income therefrom, in trust or otherwise, to persons, institutions, associations, or corporation, not hereinafter exempted, in the following cases: When the transfer is by will or by the intestate laws of this state from any person dying possessed of the property while a resident of the state. When the transfer is by will, or intestate law of property within the state or within the jurisdiction of the state and decedent was a non-resident of the state at the time of his death. When the transfer is made by a resident, or by a non-resident when such non-resident's property is within this state, or within its jurisdiction, by deed, grant, bargain, sale or gift made in contemplation of the death of grantor, vendor or donor, or intending to take effect in possession or enjoyment at or after such death. Every transfer by deed, grant, bargain, sale or gift made within two years prior to the death of grantor, vendor or donor, of a material part of his estate or in the nature of a final disposition or distribution thereof without an adequate valuable consideration shall be construed to have been made in contemplation of

death within the meaning of this section. Such tax shall be imposed when any person, association, institution or corporation actually comes into the possession and enjoyment of the property, interest therein, or income therefrom, whether the transfer thereof is made before or after the passage of this law: *Provided*, that property which is actually vested in such persons or corporations before this law takes effect shall not be subject to the tax."

While it is admitted exactly what type of transfer is to take effect in possession or enjoyment at or after death under the provisions of the above statute has not been expressly passed upon by this court, we nevertheless assert that many courts, in which a similar provision of the statute above noticed has been before such courts for determination, have uniformly ruled that any transfer, by whatever method, which has for its purpose the transfer of property or the enjoyment thereof at or after the death of the grantor, is subject to an inheritance tax. See People v. Moir, 207 Ill. 180; People v. Moses, 363 Ill. 423; In Re Brockett's Estate, 111 N. J. Eq. 183; 162 Atlantic, 150; Re Brix, 181 Cal. 667, 186 Pac. 135; Re Rotter, 188 Cal. 55, 204 Pac. 826; Harbor v. Whelchel, 156 Ga. 601, 119 S. E. 695; People v. Tavener, 300 Ill. 373, 133 N. E. 211; Brown v. Gulliford, 181 Iowa 897, 165 N. W. 182; Re Estate of Oppenheimer v. State of Montana, 75 Montana, 186, 243 Pac. 589; Re Brandreth, 169 N. Y. 437, 62 N. E. 563; Scherman v. Tax Commission, 125 Ohio State, 367; Estate of Henry Leffmann, 167 Atl. 343. We have not

attempted to analyze for the benefit of the court each of the cases above cited, but the theory underlying the decisions of those courts is perhaps ably expressed in the Case of the People v. Moses, supra. In that case, the court at page 427 et seq., said:

> "* * * * The authority of the State to levy an inheritance tax arises out of the laws of descent and devise and is an outgrowth of the principle that property rights cease upon the death of the holder. The right to receive such property is not a natural right but the property is allowed to pass at the owner's death by statutory provision, and therefore the legislature may lawfully provide, and has provided, for a tax on the privilege of acquiring or succeeding to the property rights of the deceased. Unless the property is so acquired the right to subject such property to an inheritance tax is wanting.
>
> "A transfer intended to take effect in possession or enjoyment at or after death is a disposition in which the donor retains the economic interest or enjoyment of the property during his life and is taxable. (*People v. McCormick*, 327 Ill. 547; *People v. Schaefer*, 266 id. 334; *People v. Burkhalter*, 247 id. 600.) A gift or transfer *inter vivos*, not made in contemplation of death, which is *bona fide*, completed and immediately effective and in which no beneficial enjoyment is reserved by the donor, is not subject to tax under the act (*People v. Forman, supra; People v. Northern Trust Co.*, 330 Ill. 238,) but a transfer *inter vivos*, absolute on its face and with no expressed reservations, is nevertheless taxable when it is shown by parol that the donor retained the beneficial interest in or enjoyment of the principal income for his life; (*People v. Shaffer*, 291 Ill. 142; *People v. Porter*, 287 id. 401; *People v. Shutts*, 305 Id. 539); and where transfers *inter vivos* were made in which a certain fixed income from the whole or the income from a part of the

> fund was reserved by the grantor for life, this court held that as to such portion of the estate an inheritance tax liability attached but that the portion not affected by such beneficial reservation was not taxable. * * * * *"

But, say appellants, this court has recognized by its decision in the Rosing Case, supra, that the object and purpose of the Amendment of 1931 was to tax a transfer in trust with reservation of income for life because in the case of Commissioner vs. Northern Trust Co., 283 U. S. 782, the Court held it could not be done. This proposition, we meet by asserting that what was said by this court in that case was *obiter dictum*, and not necessary in support of the decision. Our views in this respect, are supported by this court's own statement of the question, at page 196 reading as follows:

> "* * * * In the computation of the Missouri inheritance tax as imposed by the laws of Missouri, should the amount paid to the collector of internal revenue as and for the estate tax prescribed by the laws of the United States be deducted from the gross estate of the decedent?"

To otherwise state the question, with the same effect: Is a Federal Estate Tax (which is an excise based upon the right to transmit property) a proper charge of administration, to be deducted in arriving at the clear market value of said estate, so that the various interests or amounts received by heirs or legatees may be exigible under the provisions of the Inheritance Tax Act? This court held in effect that it was a proper charge of administration. This, of course, was based upon the theory that an estate

tax is an excise based upon the right to transmit property, and therefore, such a tax would be a proper charge of administration, because the heirs or legatees would not receive any part of the amount of tax paid. This was pointed out by this court at page 501 in the following language:

> "* * * * As the heir or legatee receives no part of the sum of money paid as the federal estate tax, it follows that it should be deducted in the computation of the Missouri inheritance tax."

It is to be seen therefore, from this consideration of the Rosing's Case, that what was said by this Court *en banc* respecting the amendment of 1931 was *obiter*, and the question of the object and purpose of the amendment was not before the court for consideration.

How then, may it be successfully asserted that what this court said with respect to the amendment of 1931 was motivated because of the decision of the Supreme Court of the United States in the Case of Commissioner v. Northern Trust Co., 283 U. S. 782; 75 L. ed. 1412, when the theory upon which that case was decided, as well as the Case of May v. Heiner, 281 U. S. 238, 74 L. ed. 826, was that the tax was based upon the right to transmit property at death? That court declared that a federal estate tax could not be imposed against a remainder interest that had been transferred during the life of transferor. The theory of those decisions was undoubtedly correct, because the transferor had already

parted with his interest in the remainders so that no property actually transferred at the transferor's death that had not already vested at the time of the creation of the trust. We emphasize that our inheritance tax, based upon the decisions we have heretofore reviewed, is a tax based upon the right to receive, and unless a transfer of property occurs, no tax liability arises. As in the present case, no transfer of property has taken place or been consummated so that a liability for the tax could accrue.

(1) *The amendment of 1931 is a legislative interpretation of Section 570, supra.*

For the purposes of argument, it is further asserted that the amendment of 1931 did not add anything to the then existing statute, except by way of classifying certain transfers subject to a tax. In other words, the amendment of 1931 is but a mere legislative construction of Section 570 as it existed prior to its amendment, and since therefore, the legislature interpreted the meaning of Section 570, it doubtless follows that the trust created by the decedent in 1929 would be subjected to a tax upon reason and authority before noticed. See case of Morgan v. Jewell Const. Co., 91 S. W. (2d) 638, 230 Mo. App. 425. In that case the court said:

> "It is well established that a construction of a statute by the Legislature, as indicated by the language of other or subsequent enactments, is entitled to consideration as an aid to interpreting a statute."

B. *Taxes paid to Massachusetts should not be deducted from the gross estate in arriving at its clear market value.*

Appellants argue that in the event this Court should find the trust estates subject to the payment of a tax, inheritance taxes in the sum of $89,050.00 paid to the State of Massachusetts should be deducted from the gross estate in arriving at its clear market value. This view of appellants proceeds upon the theory that the inheritance tax, being a succession tax, all taxes which are required to be paid in the administration of an estate, or which might reduce the amounts that are payable to the beneficiaries thereof, are properly deductible.

In this respect the case of In Re Estate of Rosing's has been cited in support thereof.

Respondent submits that the ruling in the Rosing's case is a correct exposition of the law. However, we do not concede that the holding of this Court in that case is here applicable in support of the theory that state inheritance taxes are properly chargeable and deductible against these trust estates. This is because an inheritance tax is one upon the right to receive property and it is only the net amount that each beneficiary receives that is required to be taxed, while the Federal Estate tax, considered in the Rosing's case, was a tax directly imposed against the *estate* rather than against the beneficiary and this Court held it a proper charge of administration in determining its clear market value.

It may be argued by appellants that it is the duty of the executor or the administrator to pay the amount of inheritance taxes assessed, out of the estate. But this would in no wise militate against the views of this Court in the Rosing's case, because it was there held that an inheritance tax is actually imposed upon and measured by the amount of property which a person actually receives. These views are fortified by cases of People v. Palmer, 25 Col. App. 450, 139 Pac. 554, and People v. Ballans, 294 Ill. 551, 128 N. E. 542.

In the Palmer case, supra, the court observed, in reaching its conclusion, as follows:

> "* * * * Neither of these deductions should be made before computing the tax, because the property passed, as provided by statute, at the time of the death, and before the expenses were incurred, and such expenses were obligations of the legatees and devisees, and not of the decedent or of the estate and not necessary expenses of administration. * * * * *
> * * * * * * * * * * * * *
>
> "The entire property, that passes at all, passes immediately upon the death, and as the *heir* must pay the tax, and not the *estate*, the heir receives the entire property and may pay the tax out of his or her personal funds, but, for convenience and certainty of collection, it is provided that it must be paid by the executor or administrator. * * * * *
>
> "With these premises in view, it must be concluded that, when the New York and New Jersey securities were sent to the executors, they had the *same value* when they reached them that they had in the state from which they were sent, and would have to be so appraised; and, if the value was in any way decreased, it was

by the act of the heir in the payment of the tax charged against the heir, by those states, and not by any act of the decedent or the estate, because neither the decedent nor the estate owed those states anything, and the payment by the executors of the tax due those states by the heir was the payment of a debt or charge against the heir, the same as the payment of the inheritance tax of this state. Everything bequeathed or devised passes to the heir, and nothing is deducted from that which passes, or ought to be deducted; not even the debts of the decedent or expenses of administration are deducted from that which passes but in contemplation of the law, before the passing takes place, as nothing can pass until the debts are paid, including the debts of the estate, such as expenses of administration. The statute says that the tax is to be paid on the value of everything that *passes by the will* or the law, and not on what the heir actually *receives*, although it makes no difference, because the heir *actually* receives everything that is bequeathed or devised; nothing can be devised or bequeathed except what is left after the obligations of the decedent and expenses of administration are paid."

It is, therefore, submitted that the inheritance taxes claimed to be a proper deduction by appellants cannot be lawfully deducted under the ruling of the Rosing's case or the Palmer case above reviewed.

III.

THE TRUST ESTATES ARE NOT EXEMPT UNDER THE PROVISIONS OF SECTION 576 OF R. S. MO., 1929.

A. *The state, having afforded a remedy to any interested person within the purview of Section 598, is entitled to assert any defense that may be asserted by*

those persons who would be aggrieved by reason of the claim of lien for inheritance taxes.

It is argued by appellants that the situation before the court is an anomalous one (Appellant's Brief, p. 36). We think the anomaly, if any, is occasioned because appellants have failed to consider the object and purpose of the statute through which, they, on behalf of those liable for the payment of an inheritance tax, seek immunity. Section 598 of R. S. Mo., 1939 provides in part as follows:

> "Actions may be brought against the state for the purpose of quieting the title to any property, against the lien or claim of lien of any tax or taxes under this article, or for the purpose of having it determined that any property is not subject to any lien for taxes under this article. * * * * * * * All or any of the persons in this action enumerated may be joined or united as parties plaintiff. The enumeration in this section of the parties who may be made parties shall not be deemed to be exclusive, but the joinder or non-joinder of parties except when otherwise herein provided, shall be governed by the rules in equity in similar cases. * * * * * All actions under this section shall be commenced in the circuit court of the county in which is situated any part of any real property against which any lien is sought to be enforced, or to which title is sought to be quieted against any lien, or claim of lien; but if in said action no lien against real property is sought to be enforced, the action shall be brought in the circuit court of the county which has or which had jurisdiction of the administration of the estate of the decedent mentioned herein. * * * * * * The procedure and practice in all actions brought under this section, except as otherwise provided in this article, shall be governed by the pro-

visions of the code of civil procedure in relation to civil actions, so far as the same shall or may be applicable, including all provisions relating to motions for new trials and appeals. * * * * * * * * * * *"

A diligent search of the authorities does not disclose any case which might be said to be precisely in point in support of the proposition that a state may assert any defense, which may be asserted by any person interested in the subject matter. However, as a general proposition of law, it is stated in 59 C. J. page 304, Par. 461 as follows:

> "While a statute authorizing suit against a state may be so framed as to waive a defense or give plaintiff a substantive right he would not otherwise have, statutes which merely give a state's consent to be sued do not, as a general rule, operate as an admission of liability, or create a cause of action in favor of plaintiff, but merely give a remedy to enforce a pre-existing right and submit the state to the jurisdiction of the court, *subject to all lawful defenses in the state's behalf*. Furthermore, since a state may withhold its consent entirely, its grant of the same may be made subject to such conditions and limitations as are deemed desirable. Any terms or conditions, thus prescribed, apparently are jurisdictional facts, and must be fully complied with. Consequently suit cannot be maintained against a state, unless plaintiff is a person, or among the class of persons, to whom the state's consent has been granted; unless the suit is founded on a cause of action, or is the type of case with reference to which suit has been authorized; unless all prescribed conditions precedent have been fully performed; and then, only in the manner, as well as in the place, and courts designated. Consent to be sued generally subjects a state to the same rules of procedure as govern in actions against in-

dividuals where there is no express provision to the contrary, or where the authorizing statute so provides; but it seems that general procedural statutes in which the state is not specifically mentioned, and which if applied will operate to restrict the state's sovereignty, cannot be invoked against the state. Moreover, in its own courts, a state is bound only to the extent of its submission, and if it extends only to an adjudication of plaintiff's claim, without any provision for its enforcement by judicial process, no effective judgment can be rendered against the state, and the only remedy is through an appropriation by the legislature in satisfaction of the court's award."

And again at page 319, par. 475, it is said:

"While, as already stated, an authorizing statute may go beyond the scope of simply waiving immunity from suit and bar the state from setting up a certain defense, or defenses, a statute which merely gives consent to be sued does not, as a general rule, operate to prevent the state from interposing defenses that would otherwise be available to it. It has been said, however, that a state should not be astute to escape inquiry into its liability by taking advantage of technical defenses which are permissible to other litigants."

It is further recognized as a general proposition of law in 12 C. J., p. 760, par. 177 as follows:

"It is a firmly established principle of law that the constitutionality of a statute may not be attacked by one whose rights are not effected by the operation of the statute. * * * * *"

Attention is also directed to the case of State ex rel. Brewster, Attorney General v. Doane, 158 P. 38, 40; 98 Kan. 435. In that case the state,

through the Attorney General, instituted an action and asserted that a particular statute was unconstitutional. The court, in ruling the question, said:

> "* * * * * The state is a proper party—indeed, the proper party—to bring this action. The state is always interested where the integrity of its constitution or statutes is involved."

Of similar effect, is the ruling of this court in the case of State ex rel. Equality Sav. & Bldg. Ass'n v. Brown, 68 S. W. (2d) 55; 334 Mo. 781, although involving the right of a ministerial officer on the advice of the Attorney General to raise a constitutional question.

From these considerations, we submit that, since the state has given the right to the appellants and all others similarly situated to sue the sovereignty, it is interested in the collection of only its just revenues. Since then, the appellants have taken advantage of this right, it seems to therefore follow, upon sound principle, that the state may assert any defense to safeguard and protect those revenues. From this it follows that the state in this action may challenge the constitutionality of Section 576, supra.

But, argue appellants, the fallacy of the state's position is at once apparent when it is considered no tax is imposed (Appellant's Brief, p. 39). This view, we think, is negatived by the statute through which appellants claim immunity, reading in part as follows:

"The tax imposed by this article in respect of personal property * * * * * * * * * * * shall not be payable * * * * * * * *."

It obviously follows, from consideration of the above pertinent parts of Section 576, that a tax is imposed by reason of the provisions of Section 570, but that such tax, under the circumstances therein set forth, shall not be payable.

The appellants in their brief (p. 37) attack the right of the respondent to challenge or to raise the constitutional provisions embodied in Section 2, Article 30. While it is admitted that the general rule of constitutional law is, that unless one belongs to the discriminated class one cannot complain, there is likewise an exception to this general rule. When all members of the class are not in a position to raise the constitutional issue, then any party even though such party does not belong to the class discriminated against, may raise the issue so long as their interests are adversely affected. It is apparent upon reading the provisions of our inheritance tax act that the parties who could claim under the exemptions provided for in the reciprocity section would not, of course, challenge the constitutionality of an act that redounded to their own benefit. It is further clear that on examining the provisions of our inheritance tax act that a party not coming within the provisions of the reciprocity act could not complain for the decision upon the validity of the constitutionality of such an act would not be necessary to determine any issue that would

arise under such a party's case. Inasmuch as no party can complain of the discrimination that is duly involved in the application of the reciprocity act and further since the State of Missouri is adversely affected by the enforcement of this act, it follows upon reason that the state comes within this exception. This exception has been recognized by the Supreme Court of California in the case of Pacific Indemnity Company vs. Myers, City Controller et al. 211 Cal. 635; 296 Pacific 1084, 1087. The Court said:

> "* * * * In this connection the petitioner relies on the general rule that one not within the class whose constitutional rights are invaded by an alleged discrimination cannot complain, and many authorities are cited in support of the general rule. Counsel for the petitioner, however, do not dispute the existence of the rule, referred to by both parties as an exception to the general rule, that when no member of the injured class can complain the question may be raised by any one whose interests are affected. * * * * * *"

This rule has likewise been applied by the Supreme Court of Mississippi in the case of Miller, City Tax Collector, vs. Lamar Life Insurance Company, 158 Miss. 788; 131 Southern 282, 285, 286. The Court said:

> "The final contention of the appellant is that these statutes are repugnant to the equal protection of the laws clause of the Fourteenth Amendment to the Federal Constitution in that it discriminates against foreign insurance corporations doing business, or that may be admitted to do business, in this state. In reply to this contention, the appellees contend that

the appellant, the State Tax Collector, cannot raise any questions of discrimination because he is not within the class that is in any wise affected or prejudiced by the enforcement of the statute. This contention of the appellees was upheld in the case of City of Jackson v. Mississippi Fire Insurance Company, supra; and this is the general rule. However, in the later case of Miller, State Tax Collector, vs. C. & G. Railway Co., 154 Miss. 317; 122 Southern 366, this rule was modified to the extent of recognizing, as an exception thereto, cases where there is no probability of the validity of the statute being challenged by one of the class discriminated against, or, if so challenged, it will be unnecessary for the court to decide that question."

From the foregoing reasons then it is submitted that the respondent herein has the right to raise the due process clause of the Missouri Constitution as well as other constitutional questions.

B. *Section 576, Supra, is a Violation of the Provisions of our Constitution.*

1. *Article 2, Section 30 is violated.*

Respondent herein in the lower court urged that Section 576 of the R. S. Mo. 1929 violated Article 2, Section 30 of the Constitution of the State of Missouri. Said constitutional section reads as follows:

> "That no person shall be deprived of life, liberty, or property without due process of law."

The respondents in this forum continue to assert the unconstitutionality of the reciprocity act as applied to the due process of law clause.

While there have been many cases interpreting the due process clause of our constitution, we deem it necessary at the outset to arrive at a definition of what is meant by due process of law when such a phrase is used in our constitution. Perhaps the most concise and clearest is contained in the case of State ex rel Wyatt vs. Ashbrook, 154 Mo. 375; 55 S. W. 627. In that case this Court held the so called anti-department store act of 1899 unconstitutional. At page 632 the Court said:

> "* * * * * if 'due process of law' is to be defined as 'the law of the land,' designed to protect and preserve the rights of the citizen against arbitrary legislation, as well as against arbitrary executive or judicial action, then 'due process of law' is denied when any particular person of a class or of the community is singled out for the imposition of restraints or burdens not imposed upon and to be borne by all of the class, or of the community at large, unless the imposition or restraint be based upon existing distinctions that differentiate the particular individuals of the class to be affected from the body of the community; and this question as to whether the persons thus designated constitute a natural or a reasonable class depends upon facts which the court passing upon the validity or invalidity of the legislation must determine upon. * * * * * *"

It follows from this definition that the court must determine whether or not the classifications set up by the legislature are reasonable and natural. What is reasonable and natural depends upon the facts of each case. White vs. Missouri, Kansas, and Texas Railway 130 S. W. 325; 230 Mo. 287. The Courts have further held

that it makes no difference whether the legislative, administrative, or judicial arm of the government determines the classification. Boonville National Bank vs. Schlotzhauer County Collector 298 S. W. 732; 317 Mo. 1298.

With these premises in mind we now must turn to our so-called reciprocity act and will now demonstrate why such act created an artificial and unreasonable classification. However, it must first be borne in mind that our present inheritance tax act which was passed in 1917 was challenged upon the grounds that said act created an unconstitutional classification because the rate of tax varied depending upon the amount of property transferred and further, the rate varied depending upon the degree of kinship between deceased and legatee. The Court is well aware that it sustained the validity of such classification. The classification of a tax rate on inheritances varying with the degree of kinship was first sustained by this court in the case of State ex rel. Fath et al vs. Henderson 160 Mo. 190; 60 S. W. 1093. In that case the Court held that a tax at a varying rate depending upon the degree of kinship between the heirs and the decedent was constitutional and did not violate the due process clause. The present act which embodies this feature and the additional feature of varying the tax rate depending upon the amount of property transferred was likewise submitted to the court upon this constitutional issue. State ex rel McClintock et al vs. Guinotte 275 Mo. 298; 204 S. W. 806. After these cases it could then

be said that our inheritance tax was constitutional based upon the evident reasoning of the court that: (1) a varying rate of tax depending upon the degree of kinship (2) a varying rate of tax depending on the amount of property transferred was reasonable and logical classification.

It is at this time to be further pointed out that classifications of this type even though they do not levy a tax (which we are not admitting herein but merely stating for the purpose of argument) still must follow the constitutional mandate of reasonable classification as set out in our due process clause. In other words to use an analogy, the legislature could not if a man died with white hair exact a levy of 5% from his heirs before they could take, and at the same time, exact no levy from the heirs of a man who died with black hair. This we believe was done by the enactment of Section 576 R. S. Mo. 1929 and therefore its validity stands challenged under the constitutional provisions before noticed. This is true because the reciprocity act provides that the inheritance tax on intangible property located in that State belonging to non-residents shall not be payable if (1) the State of residence of the non-resident, decedent, did not levy inheritance tax on the intangible property located in the said state and belonging to resident decedents of Missouri; (2) the State of residence of a non-resident extended a like reciprocal exemption as to intangible personal property belonging to resident decedents of Missouri.

The appellants assert that the reason for this classification is to avoid double taxation. Time here will not permit a discussion of the bugaboo of double taxation but we now point out to the court that this classification works unreasonable and arbitrarily against respondents and taxpayers of this state as well as against non-residents.

The effect of this act is to exempt certain fortunate individuals from certain inheritance taxes even though they belong to the classification heretofore declared by this court to be subject to a valid inheritance tax and at the same time still taxing other less fortunate members of the same classification. In other words a class within a class has been created (this is recognized as sound in the case of White vs. Missouri, Kansas, and Texas Railway, supra.) but these classes are violated when this statute acts so that members of this class do not have to pay at all if one's sister dies in a State recognizing reciprocity but if one's brother dies in a State not recognizing reciprocity then one has to pay the tax.

To summarize then it is the contention of the respondent that since the Supreme Court and the legislature have prior to the enactment of the reciprocity act of 1929 set up and recognized as lawful certain classifications for the purpose of levying an inheritance tax, any act by the legislature which cuts directly across these classifications and levies a tax or exempts from tax members of these

classes based entirely upon the irrelevant fact of where a person sees fit to die, is an unconstitutional act. Citizens—residents as well as non-residents of this State under the reciprocity act may pay a tax or be exempt from tax depending upon the inconsequential and irrelevant fact of where death overtakes their benefactor. It is the contention of the respondent that if non-residents die and leave intangible property in Missouri the heirs of the deceased should be liable for inheritance tax as a class or exempt as a class and not invididually liable or exempt depending where any person sees fit to die.

From the foregoing reasons, therefore, it is respectfully submitted that Section 576 R. S. Mo. 1929 violates the due process clause of the Constitution of the State of Missouri.

2. *Article 10, Section 3 is violated.*

It was the position of the respondent in the lower court and it is likewise again urged here in this forum that Section 576 R. S. Missouri 1929 creates an unequal burden of taxation and thus violates Article 10 Section 3 of the Constitution of the State of Missouri. Said constitutional provision is as follows:

> "Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

The question to determine in discussing this point is whether or not our inheritance tax act levies

a tax and, if so, whether the tax comes within the provisions of this constitutional inhibition against unequal taxation.

Originally there seems to have been some doubt in the Court's mind as to the exact nature of the exaction under our inheritance tax act. In the case of the State ex rel McClintock vs. Guinotte (supra) the Supreme Court leaned towards the view that the Inheritance Tax Act did not exact a tax but rather was a levy by the sovereignty on the privilege of transferring property belonging to decedents to their heirs or legatees. However, this court has apparently receded from this original view for in the cases involving our Inheritance Tax Act since decided by this Court, this Court has ruled that our Inheritance Tax Act is a tax or excise upon the right of heirs or legatees to receive property by reason of death. A complete analysis of cases in support of this view was reviewed at Page 10. Brown vs. State, supra; Bryant vs. Greene, supra. In re Rosing's Estate, supra; In re Bernay's Estate, supra.

Since it has been held by these recent cases that this Inheritance Tax Act of ours imposes an excise on the right to receive the question then arises—does the constitution of the State of Missouri and, more particularly, Article 10 Section 3 apply to excises? Though appellants contend to the contrary, the Supreme Court of this State has specifically recognized that Article 10 Section 3 of the Missouri Constitution is applicable to excises. This was

expressly recognized in the case of the State ex rel Thompkins vs. Shipman 234 S. W. 60, 62, 63; 290 Mo. 65, wherein the Court said:

> "Subjects of taxation constitute several things. The general subdivisions are (1) property, (2) polls, and (3) excises, so that the general subdivision of taxes are (1) taxes on property, (2) poll taxes, and (3) excise taxes. 26 R. C. L. p. 34.
>
> The term 'excises' has been made to cover a broad field. The authority, supra, says:
>
> 'Excises, in their original sense, were something cut off from the price paid on a sale of goods, as a contribution to the support of government. The word has, however, come to have a broader meaning, and includes every form of taxation which is not a burden laid directly upon persons or property; in other words, excise includes every form of charge imposed by public authority for the purpose of raising revenue upon the performance of an act, the enjoyment of a privilege, or the engaging in an occupation.'
>
> Section 3, article 10 of our Constitution requires uniformity of tax 'upon the same class of subjects,' and it is urged that this section is authority for a subdivision of 'property' into different classes, and for the fixing of a different tax upon one of the classes of property than is fixed upon the other remaining kinds of property. We do not so view this section of the Constitution. It is dealing with subjects of taxation, and not with any particular subject of taxation. Its purpose was to secure uniformity of taxation, whatever be the subject of taxation. And as to excises it might have reference to sundry classes or subjects. * * * * *"

Further, it may be pointed out that it has been held time and again by this Court that Article 10 Section 3 requires an excise to be reasonably

classified and that it must be uniform upon all parties within the class. This principle is well settled and has been recognized in many cases. See Ex Parte Asotsky 5 S. W. (2) 22; 319 Mo. 810: State vs. Freehold Investment Co. 264 S. W. 702; 305 Mo. 88: State ex rel Wyatt vs. Ashbrook supra; Kansas City vs. Whipple 38 S. W. 295; 136 Mo. 475.

With these premises in mind we now come to the proposition that the legislature by enacting our Inheritance Tax Act and this court by sustaining the same upon test in the case of State ex rel. McClintock vs. Guinotte, supra, held that the classifications set up under the terms of that act were valid and did not violate Article 10 Section 3 of our Constitution. In other words it was held that the inheritance tax levied a tax at a varying rate depending (1) upon the degree of kinship between the heir and legatee and the deceased and (2) upon the amount of property transferred, and that such classification was valid.

This classification being valid it is the contention of the respondent herein that it is unconstitutional under the provisions of Article 10, Section 3 for the legislature to attempt by passing the reciprocity act to exempt individuals in these representative classes from the payment of the tax and it matters not whether these individuals were residents or non-residents. Section 576, R. S. Mo. 1929, provided that the excise on intangible personal property situated in Missouri and belonging to non-residents should not be payable providing

similar exemptions were granted by the foreign state. It can be clearly observed that the effect of this amendment is to destroy the basis of uniform classes of taxation theretofore sustained by this Court as being constitutional. This is true because the tax levied on the basis of the relationship with the deceased and the amount of property transferred has been entirely negated by Section 576, R. S. Mo. 1929. For example, a man may inherit intangible personal property having a situs in this state from a brother living in a state not having reciprocity and such a man must pay an inheritance tax to the State of Missouri based upon the original classifications. While another man in the same class may inherit intangible personal property whose situs is in this state, from a brother residing in a state having reciprocity and such a man would pay no tax to the State of Missouri. Since the basis of classification under Article 10, Section 3 of our Missouri Constitution requires that all people belonging to one class must pay at the same rate, i. e., brothers and sisters under the act pay one rate which rate itself might vary with the amount of property transferred, this classification then is invalidated when a subsequent amendment declares one member of the class must pay and the other one shall not, depending not on the class but based entirely upon where Father Time overtakes the decedent.

From the foregoing reason then it is respectfully submitted that inasmuch as the reciprocity act does not place the burden of inheritance taxes uniformly

upon the members of the same class that, therefore, Section 576 R. S. Mo. 1929 violates Article 10, Section 3 of the Constitution of the State of Missouri and that said statute is, therefore, null and void.

C. *The withdrawal of the exemption provided by Section 576 R. S. Mo., 1929 by the legislature in 1939 now requires the payment of a tax under circumstances here involved.*

It is argued by appellants that if the repeal of Section 576 by the legislature in 1939 is interpreted so as to make the trust property herein involved exigible, then such interpretation would violate the provisions of the 14th Amendment to the Federal Constitution, and likewise Sections 15 and 30 of Article II of the Constitution of Missouri. This is because the repeals may only operate prospectively. (Appellants Brief p. 45.)

It is strenuously asserted, under the evidence in this case, that no transfer of the property herein involved has taken place, nor did appellants, in the trial of this case, prove or offer to prove that the transfers had actually been completed prior to the repeal of Section 576, supra. Our views in this respect are substantiated by a consideration of the general proposition of law respecting exemptions from taxation in 61 C. J. p. 407, par. 421, reading as follows:

> "By virtue of the control of the state over the whole subject of taxation it is always competent for the legislature, except where restricted by the contractual nature of the grant,

> to repeal an entire or partial exemption from taxation, and impose taxes on the property in question; and therefore if such a grant was not in the nature of a contract, but was a mere gratuity, or concession for which no price was paid or service rendered, it is at all times revocable at the pleasure of the legislature; and the grant of an exemption as a gratuity is none the less a gratuity because made on a condition which has been complied with. Revocation of an exemption, to be effective, must be based on an existing power in the governmental agency assuming to exercise it."

From the above general statement of the law, it will be particularly noticed that the legislature may withdraw any exemption of property from taxation previously granted and impose a tax on such property, provided the exemption or grant from taxation was not in the nature of a contract. If however, the exemption was a favor or gratuity for which no forbearance was required, it was competent for the legislature to withdraw it at any time. In this respect, it will be noticed that appellants urge that the statute was enacted as a part of a nation wide system designed to avoid double taxation between the states, and thereby admitting that Section 576, supra was enacted as a favor or gratuity to non-resident transferors whose states had likewise exempted the residents of this state. (Appellant's Brief p. 22.)

In further support of the proposition that the beneficiaries, under the trust indentures here involved, are not entitled to the benefit of the provisions of Section 576, supra, before its repeal,

attention is directed to the case of Blodgett v. Bridgeport City Trust Co., 161 Atl. 83; 115 Conn. 127. In that case the question before the Supreme Court of Errors of Connecticut was whether or not a bequest to the Harvard University, under the provisions of the decedent's will, was subject to the payment of a tax. The statute there under consideration at the date of the death of the testator in 1929 provided among other things, that bequests to certain charitable and literary institutions were exempt from the payment of a tax, providing the property transferred was to be exclusively used for such purposes; but that no transfer should be exempt if any officer or member of such institution should receive, or be lawfully entitled to receive any pecuniary profit from the operation of such institutions, excepting reasonable compensation for services effecting one or more of the purposes. Under the facts involved in the case, the court held that this bequest was not taxable, under the provisions of the act, at the time of decedent's death. However, in 1931 the legislature amended this section of the statute so as to bring the bequest clearly within the provisions of the taxing act, and further provided in substance that the provisions of the amended section should apply to all suits and proceedings pending for the collection of any taxes due the state. It was argued that such legislation was unconstitutional because such section of the statute, as amended, was retroactive in its terms. That court, in reaching its conclusion, observed that:

"Since the right to transmit or receive property upon the death of the owner is not an inherent right, but purely a privilege granted by the state, it is obvious that that privilege may be abridged or coupled with conditions at the will of the state. * * * * * * *"

The court further observed at page 88:

"* * * * It has been recognized in a long line of concurring decisions in this and other states that the legal title to real estate passes to the beneficiary at the moment of the decedent's death, while the legal title to his personal property vests, not in the beneficiary, but in the executor or administrator, as the case may be, and the right which accrues to the beneficiary upon the death of the decedent is purely equitable. * * * * * * *

"Not having the legal title during the period of administration, the beneficiary cannot convey title to a third party, though he may convey such interest as he has; on the other hand, the legal title being in the executor, the latter can convey it or make other proper use of it, such as paying the expenses of administration, or taxes, or other charges, and, in case of suits involving it, he and not the beneficiary, is the proper party to the action. * * * * * *"

In ruling the question involved, that court further said at page 89:

"* * * * we do not regard the full succession as having taken place upon the death of the decedent. The right to the ultimate title and ownership did arise at that time, and may be said to have vested in the beneficiary, but that was but one step in the process of succession, and the beneficiary does not become the actual and unconditional owner of the property until the estate has been administered and legally distributed and the succession consummated; not

> until then does he enjoy the privilege which the state has granted him, and upon which it is imposing the tax."

While the precise question here involved has never been before this court for consideration, it is believed that the reasoning of the Supreme Court of Connecticut in the Blodgett case, supra is persuasive of the question involved here. The nearest this court has approached this question is in the cases of In Re Rosing's Estate, supra and In Re Estate of Costello v. King, 338 Mo. 673, 678; 92 S. W. (2d) 723. In the Rosing's Case this court expressly held, at l. c. 501, that:

> " 'Such tax shall be imposed when any person * * * * *actually comes into the possession*: and enjoyment of the property'." (Emphasis by this court.)

The observation of this court respecting the imposition of an inheritance tax was again before this court in the Costello Case, supra. In that case the question before the court was whether or not a tax could be imposed, since the person entitled to receive the property died before distribution. This court said:

> "* * * * In this connection it also should be noted that the italicized words provide that the tax shall be imposed when *any person* actually comes into the possession and enjoyment of the property. The words 'any person' as used mean a person or persons lawfully entitled to possession and enjoyment. If so, the act provides for the imposition of the tax when the executrices of the estate of Mrs. Robison actually come into the possession and enjoy-

ment of the property. As used, the word 'enjoyment' does not mean personal enjoyment. It means control.

"Furthermore, Mrs. Robison had a vested interest in her share of James Costello's property, subject to administration and lawful charges. * * * * * * *"

In other words, the effect of this court's language in the case last above cited, is that whenever any person becomes lawfully entitled to possession or enjoyment of property, the tax liability then and there accrues, because the person's interest is vested. This is the argument of appellants herein, based upon the above decision. We subscribe to this court's ruling in the Costello Case, but say such ruling is not here applicable, because the decedent herein guarded against the vestiture of any interest in the property, until such property was actually transferred. In this respect, it will be noticed from the trust indenture, created under date of February 14, 1921, that the decedent said:

"* * * * * it being my desire and I so direct that no right of disposition of any such property shall vest in any beneficiary hereunder, until the same shall have been actually transferred and paid over to him or her." (Abs. p. 55.)

It is apparent, from the above quoted portion of the trust indenture, that the beneficiaries were not to acquire title to the intangible personal property until such time as such property was actually distributed. Since then, the decedent indicated that title was to vest upon distribution, and

under the facts herein involved such distribution has not occurred, there has been no transfer of title to the property, and therefore, the final act in the consummation of the transfer has not taken place. This was pointed out by the Supreme Court of Connecticut in the following language at page 89:

> "It is only upon the delivery of personal property to the beneficiary through legal distribution after administration is complete that he acquires the legal title to it. By the act of distribution, the title vests, and the beneficiary becomes for the first time the legal owner of the property. It is distribution, not the death of the decedent, which transfers the title and ownership of personalty to the beneficiary. * * *"

While the right of the beneficiaries herein involved to receive the property accrues at the death of the decedent, the liability for the tax does not accrue until the property is actually transferred. We emphasize that the tax is imposed upon the right to receive, measured by the value of the property as of decedent's death, when the property is actually received.

Under Point 4 in appellants' brief, appellants go into a detailed explanation as to why the repeal of the reciprocity act in 1939 could not be construed to impose a tax on the trust estates herein involved. It is to be observed from reading Point 4 that all the cases cited by appellants bearing on the precise point do not deal with the withdrawal of an exemption. Such cases in fact deal with the imposition or the altering of the rate of a tax. Such being the case it

follows that they are not applicable in the instant case for inasmuch as the general taxing provision of our inheritance tax act already imposed the tax long prior to the creation of these trusts herein involved and the sole effect of the 1939 repeal was to withdraw a gratuitous exemption. In the instant case *the State of Missouri is asserting a tax against the transfer of the possession and the enjoyment of the property in the trust estates.* This transfer cannot in fact be completed until the various cestui que trust interests have fully been transferred. It is true that the tax is measured by the value of the property as of the date of the death of the deceased and it is likewise true that the various beneficiaries' interest became equitably vested as of the date of the death of the deceased but it is not true that this intangible, personal property had been fully transferred prior to the repeal of the reciprocity act. Such being the case it is competent for the State at any time prior to the completion of the transfer to withdraw the gratuity granted. This rule of law has been applied before in the case of, Haizlip vs. Haizlip, 240 Mo. 392; 144 S. W. 851.

It is therefore respectfully submitted, in addition to the specific provision provided under the trust instrument of 1921, that the beneficiaries thereunder could not acquire any title to the same nor could the property vest until distribution has actually been made (abstract of the record page 55); that under the terms of all the trust instruments (abstract of the record pages 43-70) the beneficiaries

can only come into enjoyment of the property providing they survive to the date when such property is actually transferred to them.

It is further submitted that inasmuch as this property had not been transferred prior to the repeal of Section 576, supra, it is proper for the respondent herein to assert an inheritance tax against the trust estates herein involved under the provision of Section 571 R. S. Mo. 1939.

D. *The trust estates involved herein having acquired a business situs, Section 576 R. S. Mo. 1929 has no application.*

Appellants in their brief (page 44) asserted that the reciprocity act if construed to be applicable only when the State of Missouri had no constitutional right to assert an inheritance tax and inapplicable when a business situs had been acquired that the statute would be null and void and to no effect and would be a construction that would imply a meaningless act on the part of the State legislature. This plausible but unsound reasoning on the part of the appellants should, in our opinion, be exposed before we develop respondent's theory of business situs. Appellants in the early part of their brief cite the cases of Farmer's Loan and Trust Co. vs. Minn. (1930) 280 U. S. 204; Baldwin vs. Missouri (1930) 281 U. S. 586; First National Bank of Boston vs. Maine (1932) 284 U. S. 312 as historical authority for the reason of reciprocity. It is to be noted that every one of these decisions by the Supreme Court

of the U. S. limiting the constitutional rights of the individual states to assert inheritance taxes were decided after the passage of our reciprocity act. In other words the fields of taxation which were limited by these decisions were not the law of the land at the time of the enactment of the reciprocity act. Such being the case how can it be said that the reciprocity act when passed was meant to apply only to business situs and be useless legislation so far as the other situations under the cases above were concerned? It seems that the converse must be true; that is, that the reciprocity act was meant to apply in those cases subsequently determined by the Supreme Court of the U. S. to be unconstitutional to tax.

The theory of business situs as applied to intangible personal property making such property taxable in the state of their situs rather than in the State of their owner's domicile is an old doctrine. It was recognized first in Missouri in the case of the State of Missouri on the part of D. G. Taylor, administrator of A. H. Lee, Deceased vs. St. Louis County Court, 47 Mo. 594 (1871). In that case the facts revealed that a man died in Illinois and left intangible personal property in Missouri consisting of mortgages and notes in the City of St. Louis. This Court held that such intangible personal property was subject to the payment of a personal property tax in Missouri. This Court at page 603 said:

> " * * * that part of the estate of the decedent in the hands of the Missouri administrator is properly subject to taxation in this State and not elsewhere, * * *"

The doctrine of business situs as used in connection with the assertion of an inheritance tax is not new and has been recognized from time to time by the Supreme Court of the U. S. In the case of Baldwin vs. Missouri, supra, the Supreme Court of the U. S. while applying the then rule of constitutional law that the Fourteenth amendment prohibited taxation of intangibles of a non-resident specifically excluded from its ruling the question of business situs. Baldwin vs. Missouri, supra. At page 590 the Court said:

> " * * * The record discloses nothing intending to show that personal property had been given a business situs in that State."

Further since that time the Supreme Court of the U. S. in the case of Curry vs. McCanless, supra, and Graves vs. Elliott, supra, held that there was no constitutional inhibition against the levying of inheritance taxes under the circumstances similar to those of the instant case.

Business situs while difficult to define may be described as the act of a person locating his property within a given State and there using it for the purposes to which it is fitted for a sufficient length of time to indicate a course of business. This seems to be the best definition that can be garnered from

reading the decisions in the cases of New Orleans vs. Stemple, 175 U. S. 309; First Bank Stock Corporation vs. Minnesota, 301 U. S. 234; Bullen vs. Wisconsin, 240 U. S. 625; Curry vs. McCanless, supra; Graves vs. Elliott, supra. It can easily be seen that the trust estates involved herein comply with all these conditions. *From the date of the creation of the original trust to the date of the death of the deceased, this property was located in the State of Missouri. The decedent assigned and transferred full legal title to this property to the appellant* (abstract of the record page 29, 30, 31) *as trustee.* The appellants herein (the trustees) retained the physical evidences of such property in its name and in its possession within the State of Missouri. Appellants likewise practised full discretion and control over the management and care of the property (abstract of the record, page 33, 34). This control was not passing but continued for a period of almost twenty years from the date of the trust, 1917 up to the death of the deceased 1935 (abstract of the record, page 29).

It is further to be pointed out that the so-called reciprocity act was enacted by the general assembly (Laws of Mo., 1929, page 102) and was approved on June 1, 1929. This law, therefore, was on our statute books prior to the decision of the Supreme Court of this State in the case of Baldwin's Estate vs. Missouri, supra. Under the facts in that case the court held that the general taxing provision of our inheritance tax subjected the deceased's estate to an inheritance tax, on the property passing by

reason of death. While the court in the Baldwin case did not find that a business situs had been created the facts and circumstances surrounding the case and the general inquiry of the court in the course of its opinion as to the purpose of the location of the property in Missouri lead but to the conclusion that the court recognized the existence of such a possibility. In the Baldwin case, it is to be noted that this court decided, after the passage of the reciprocity act, that tax on that estate was payable. It cannot be presumed that the Supreme Court did not take notice of this act; in fact, the contrary must be assumed. Since the court under that set of facts made no reference to our reciprocity act it must necessarily follow that the statute was not intended to apply.

It follows, therefore, upon reason that if the statute was not intended to apply in that case, the facts in the instant case then are even stronger and such a statute should not apply in this case.

Further, it must be noted specifically that the Circuit Court upon the evidence found that this property had a business situs (abstract of the record, page 23). This property has accumulated and multiplied many times over (from a value of $445,050 in 1921, Abstract of the record, page 58, to $1,850,-789.77 at the time of her death, Abstract of the record, page 35) under the protection and benefit of the government of the State. Yet the appellants now complain for having to pay a tax.

Since the Supreme Court of the U. S. had held that there is no constitutional inhibition against taxing intangible personal property where a business situs had been acquired and since the Supreme Court of this State by its previous opinion has inferred that intangible personal property located in this state for a period of time and enjoyed the protection of its laws was not subject to the provisions of the reciprocity act, it follows, therefore, that Section 576 R. S. Mo. 1929 has no application in the instant case.

CONCLUSION.

It is respectfully submitted that the trust estates herein involved are exigible under the taxing provisions of our inheritance tax act, because: (1) Section 571 expressly provides for an imposition of a tax upon the property involved in the trusts; (2) There is adequate language under the general taxing statute in effect at the time of the creation of the 1939 trust to subject said trust to inheritance tax despite the explanatory amendment to such Section in 1931; (3) The inheritance taxes paid by the appellants herein to the commonwealth of Massachusetts, in pursuance of a compromise settlement, are not proper deductions in arriving at the clear market value for the purpose of assessing a Missouri inheritance tax; (4) Appellants claim for exemption under Section 576 R. S. Mo. 1929 cannot be sustained in view of the arguments herein adduced.

It is further submitted that, the amount of the tax being agreed upon by the parties hereto and the judgment for taxes being entered in the Circuit Court in the sum of $182,349.69, said judgment should be affirmed.

Respectfully submitted,

ROY McKITTRICK,
Attorney General,
RUSSELL C. STONE,
Assistant Attorney General,
WILLIAM C. CONNETT, IV,
Assistant Attorney General,
Attorneys for the Respondent.

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